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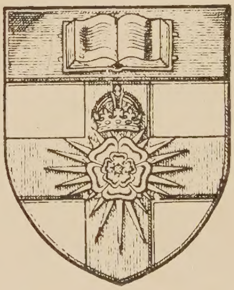

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LAW REPORTS
OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

◆

Editor—Right Hon. Sir FREDERICK POLLOCK, Bart., K.C.

Reporters.
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1933.

Published by THE COUNCIL at its office, 30, MONTAGUE STREET, LONDON, W.C. 1,
AND
Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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1932.

Nov. 26. WILLIAM BRUCE THOMAS, ESQ., K.C., *was appointed to be a permanent member and President of the Railway Rates Tribunal, in the place of Sir Walter B. Clode, K.C.*

1933.

Feb. 25. *The King was pleased to confer the dignity of a Viscount of the United Kingdom upon the* RIGHT HON. STANLEY OWEN, BARON BUCKMASTER, G.C.V.O., *by the name, style and title of Viscount Buckmaster of Cheddington in the County of Buckingham.*

Apr. 26. THE HON. SIR HENRY ALFRED McCARDIE, *a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at his residence, Queen Anne's Mansions, S.W.* 1, *aged* 64.

May 12. CYRIL ATKINSON, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

July 24. *This day the* HON. SIR JOHANNES WILHELMUS WESSELS, *Chief Justice of South Africa, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Oct. 2. SIR FRANK BOYD MERRIMAN, O.B.E., K.C., *His Majesty's Solicitor-General, was appointed to be President of the Probate, Divorce and Admiralty Division of the High Court of Justice in the place of the Right Hon. Lord Merrivale, resigned.*

Oct. 2. DONALD BRADLEY SOMERVELL, ESQ., O.B.E., K.C., *was appointed to be His Majesty's Solicitor-General and was afterwards knighted.*

Nov. 10. *This day* SIR FRANK BOYD MERRIMAN, O.B.E. *was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

MIDLAND BANK, LIMITED . . . . APPELLANTS; H. L. (E.)*

AND 1932

RECKITT AND OTHERS . . . . . . RESPONDENTS. *Feb.* 29.

ET E CONTRA.

Banker—Principal and Agent—Power of Attorney—Excess of Authority—Authority to draw Cheques—Cheques drawn by Attorney and paid into his own Banking Account for his private Purposes—Notice of Breach of Trust—Conversion—Liability of Bankers for Conversion and Money had and received—Negligence—Ratification Clause in Power of Attorney—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 82.

T., a solicitor, was authorized by a power of attorney given him by a client to draw cheques on the client's banking account and to apply the moneys for the purposes of his client. T. for his own purposes fraudulently drew fifteen cheques on his client's account with the B. bank, signing the cheques by using a rubber stamp which had on the upper line the name of the client and the word "by" and on the lower line "his attorney" and by placing his own signature between the lines. T. then paid the cheques into his own account with the M. bank, the defendants, with whom he had an overdraft. On discovering the facts the client brought an action against the defendants for damages for conversion of the cheques. The defendants relied on s. 82 of the Bills of Exchange Act, 1882, alleging that the cheques were crossed cheques and that they had received payment of them in good faith and without negligence. During the proceedings T.'s client died, and the proceedings were continued by the client's executors as plaintiffs. It was admitted that the defendants had acted in good faith:—

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

Held, as to all the cheques except two, which depended on special circumstances, affirming the decision of the Court of Appeal, that the defendants, in presenting and receiving payment for the cheques, had converted them, and that, as the defendants had from the form of the cheques notice as to the money not being T.'s money, they were negligent in making no inquiry as to T.'s authority to make these payments into his own account, and therefore failed to bring themselves within s. 82 of the Bills of Exchange Act, 1882.

Reckitt v. *Barnett, Pembroke & Slater, Ld.* [1929] A. C. 176 applied.

Held, further, that a ratification clause in the power of attorney whereby the principal agreed to ratify and confirm whatsoever the attorney should do or purported to do by virtue of the power did not affect the plaintiff's right to maintain the action.

APPEAL from an order of the Court of Appeal reversing a judgment of Rowlatt J. in favour of the appellants in an action in which Sir Harold Reckitt was plaintiff and the appellants were defendants, and ordering that judgment be entered therein for the plaintiff for 13,490*l.* with costs.

The respondents were the executors of Sir Harold Reckitt, who died after the decision of the Court of Appeal, and by order of the Court the proceedings in the action were continued between the respondents and the appellants.

There was also a cross-appeal from the order of the Court of Appeal asking that the amount for which judgment should be given for the respondents against the appellants might be increased by 4400*l.*

The action was brought by the plaintiff to recover 17,890*l.*, being the proceeds of fifteen cheques wrongfully and fraudulently drawn by one Lord Terrington as the plaintiff's attorney upon the plaintiff's banking account with Barclays Bank, Ld., at Hull, and wrongfully and fraudulently paid by him into his account with the defendants, the Midland Bank, Ld., in the name of H. J. S. Woodhouse & Co.

Lord Terrington, formerly Harold James Selborne Woodhouse, carried on business as a solicitor in London as H. J. S. Woodhouse & Co.

By his statement of claim the plaintiff alleged that the said fifteen cheques were drawn fraudulently and wrongfully and without his authority, knowledge or sanction by Lord Terrington, and were paid by Lord Terrington for his own private purposes into his account with the appellants, and that the appellants, who received the cheques signed by Lord Terrington in his own name as attorney for Sir Harold, were guilty of (*a*) conversion of the cheques, and (*b*) negligence in the collection of the cheques, and were liable to the plaintiff in the amounts thereof either as damages for conversion or as money had and received to his use.

By their defence the appellants denied any conversion or negligence, and they alleged that they received payment of the cheques, which were crossed, for their customer in good faith and without negligence and were protected by s. 82 of the Bills of Exchange Act, 1882.

Rowlatt J. came to the conclusion that there was no knowledge or notice on the part of the appellants of a prima facie breach of duty by Lord Terrington, and he dismissed the action.

The Court of Appeal (Scrutton, Greer and Slesser L.JJ.) held that, with the exception of the first two cheques, the appellants were liable for the amounts of the cheques as damages for conversion; that the appellants were put upon inquiry and had notice of the limited authority of Lord Terrington to deal with such cheques, except the first two, as he did, and that having made no inquiry were liable to the plaintiff in the amounts thereof as money had and received to his use; and that, although the appellants acted in good faith, which was not in question, they were not protected by s. 82 of the Bills of Exchange Act, 1882, in the collection of the cheques other than the first two, because they were negligent in not making any inquiry. The Court further held as to two of the cheques, as to which the appellants claimed to be holders for value to the extent to which Lord Terrington's account was in debit when they were respectively paid in, that, having notice of Lord Terrington's authority, they were not holders in due course, and that a ratification clause in the power of attorney did not extend to Lord Terrington's acts in paying his principal's cheques into his own account.

The facts relating to the several cheques sufficiently appear from the opinion of Lord Atkin. The provisions of the extended power of attorney, to which Lord Atkin refers in his opinion, and which was in force during the relevant period, are set out below so far as material to the present appeal.

By this power the plaintiff (thereinafter called "the principal") appointed Lord Terrington (thereinafter called "the attorney") to be the attorney of the principal in the name and on behalf of the principal to do all or any of the following things:—

"13. To apply any moneys which shall come to the hands of the attorney by virtue of the powers herein contained in such manner and order as the attorney shall think fit in paying and discharging the costs and expenses of and incidental to these presents and all other costs charges damages and expenses which the attorney shall pay sustain incur or become liable for in or about the execution of the powers vested in or given to the attorney by these presents or in any wise relating thereunto and any . . . . moneys interest or costs which may now or hereafter be owing from the principal to the attorney or any other person or persons and in keeping down and discharging the interest due and to accrue due on any securities already existing or to be given by the attorney on behalf of the principal by virtue of these presents and in paying and discharging all moneys and costs payable and incurred in or about the exercise of this power of attorney or in otherwise disposing of the same for the use and benefit of the principal as the attorney shall think proper.

14. To deposit any moneys received by the attorney under or by virtue of these presents with any banker broker solicitor

or other person in the name of the principal or of the attorney and to withdraw such moneys or any other moneys which are now deposited on behalf of the principal with any banker broker solicitor or other person and to employ or apply all or any such moneys in such manner or for such purposes as may be thought fit. . . . .

17. To draw accept endorse negotiate retire pay or satisfy any bills of exchange promissory notes cheques drafts dividend or interest warrants orders for payment or delivery of money securities goods or effects bills of lading or other negotiable or mercantile instruments or securities which may be deemed necessary or proper in relation to the business or affairs of the principal and to give renew or withdraw authorities or directions to any bankers or other persons or corporations which the principal would himself give renew or withdraw.

And the principal hereby for himself his heirs executors and administrators ratifies and confirms and agrees to ratify and confirm whatsoever the attorney or any such person as aforesaid acting as the agent of or substitute for or in place of the attorney shall do or purports to do by virtue of these presents including in any such confirmation whatsoever shall be done between the time of the death of the principal or the revocation by any other means of this power of attorney and the time of such death or revocation becoming known to the attorney or any such person as aforesaid."

1932. Jan. 26, 28, 29; Feb. 1. *Rayner Goddard K.C.* and *D. B. Somervell K.C.* for the appellants. There was here no conversion. Lord Terrington in drawing the cheques in question was acting within the terms of the authority conferred upon him by the plaintiff, and the appellants obtained a good title to the proceeds. A third party acting bona fide is not in a transaction with an attorney affected by the fact that the attorney is abusing his authority and using it for his own purposes: *Bank of Bengal* v. *Macleod* (1); *Bank of Bengal* v. *Fagan*. (2) This view is supported by the reasoning in *Reckitt* v. *Barnett*,

(1) (1849) 7 Moo. P. C. 35.

(2) (1849) 7 Moo. P. C. 61.

Pembroke & Slater, Ld. (1), which proceeded not on conversion but on the fact that the defendants had prima facie notice of the breach of trust. There was nothing in the circumstances of this case to put the appellants on inquiry. The question whether a third party should be put on inquiry by an act of an attorney must depend on whether the act would be in any way unusual or excite comment if done by the principal himself. In the present case there is nothing unusual in a wealthy man in the course of four years paying some 18,000*l.* to his solicitor and attorney, nor in the fact that as regards certain of the cheques the account was at the time overdrawn. Regarded as a solicitor's account the natural inference was that Lord Terrington was being paid large sums by his clients and was making large payments on their behalf. Further, a collecting bank is primarily concerned with the description of the payee and the correctness of the indorsement. The genuineness or regularity of the drawer's signature is a matter for the bank on which the cheque is drawn. It would be unreasonable to hold a collecting bank's officials guilty of negligence because they had not scrutinized that part of the cheque—namely, the drawer's signature—with which they had no reason to believe themselves to be concerned. Barclays Bank, Hull, was the plaintiff's agent to pay or refuse cheques drawn on his account there. The fact that all these cheques from May 15, 1922, to February 20, 1926, were met without any question being raised precludes the plaintiff from disputing Lord Terrington's authority and from relying on the failure of the appellants to make further inquiries. On these grounds the appellants are entitled to the protection of s. 82 of the Bills of Exchange Act, 1882. Further, the appellants cannot be held liable as having prima facie notice of a breach of trust on the principle laid down in *John* v. *Dodwell & Co.* (2) and applied in *Reckitt* v. *Barnett, Pembroke & Slater, Ld.* (1) The appellants were dealing with Lord Terrington as a solicitor. A solicitor attorney in the ordinary discharge of his duties would from time to time be paying money of his clients into his own account. A transaction which would in the ordinary course be expected and regular, cannot amount to prima facie notice of a breach of trust. Further, if necessary, the appellants rely on the ratification clause in the power of attorney whereby the plaintiff ratifies and confirms whatsoever the attorney shall do or purports to do by virtue of the power. The effect of that is to absolve a bona fide third party from making inquiries whether an act of the attorney purporting to be done under the power is being done on the principal's behalf or not: *Hambro* v. *Burnand*. (1) Further, as to certain of the cheques the appellants claim that they were holders for value to the amount by which Lord Terrington's account was in debit at the dates when the cheques were paid in without notice of any defect in title. To preclude a person from being a holder in due course actual notice is necessary. Constructive notice has no application to the Bills of Exchange Act, 1882: *Raphael* v. *Bank of England* (2); *Jones* v. *Gordon* (3); *London Joint Stock Bank* v. *Simmons* (4); *Corporation Agencies, Ld.* v. *Home Bank of Canada*. (5)

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(1) [1929] A. C. 176.

(2) [1918] A. C. 563.

F. P. M. Schiller K.C. and *H. G. Robertson* for the respondents. The appellants received the plaintiff's fifteen cheques with notice on the face thereof that they were drawn by Lord Terrington as the plaintiff's attorney; they had notice that Lord Terrington's authority was limited, and were put upon inquiry as to the extent of such authority and they in fact made no inquiry. As Lord Terrington's bankers they knew that Lord Terrington was paying the cheques into his account and operated that account for his personal purposes, including the repayment of his indebtedness to the appellants. The power of attorney given by the plaintiff to Lord Terrington did not authorize or entitle Lord Terrington to deal with the cheques as he did. In these circumstances the appellants converted the cheques and are liable to him in the amount thereof as damages for conversion: *Morison* v. *London County and*

(1) [1904] 2 K. B. 10.
(2) (1855) 17 C. B. 161, 174.
(3) (1877) 2 App. Cas. 616, 629.
(4) [1892] A. C. 201, 221.
(5) [1927] A. C. 318, 323, 324.

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Westminster Bank (1); *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* (2); *Lloyds Bank* v. *Chartered Bank of India, Australia and China* (3); *Bank of Montreal* v. *Dominion Gresham Guarantee and Casualty Co.* (4) Where a person signs a cheque per pro and pays it into his own account and the bank makes no inquiry as to the drawer's authority, that is enough to show that the bank is not acting without negligence. Sect. 25 of the Bills of Exchange Act, 1882, provides that "a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." That merely expresses the common law. In making no inquiries the appellants fail to prove that they acted without negligence so as to become entitled to the protection of s. 82. Here Lord Terrington, at the repeated request of the bank, was applying these cheques in the reduction of the overdraft although the bank had notice from the form of the cheque that the money was not Lord Terrington's and it could not be suggested that the money was being applied in discharge of any possible liability of the principal. In omitting to make any inquiry as to the extent of the customer's authority the bank became liable to the plaintiff on the principle of *Reckitt* v. *Barnett, Pembroke & Slater, Ld.* (5) As to the ratification clause, the bank never saw the power of attorney and never acted upon it, but, apart from that, it did not affect the right of the plaintiff to maintain this action. As to the cheques in respect of which the appellants claimed to be holders for value in due course they were not holders in due course by reason of the notice they had received by the form of the cheque. The Court of Appeal were right, in so far as they ordered judgment to be entered for the plaintiff, but were wrong in holding that the bank had disproved negligence in regard to the first two cheques, and the plaintiff was entitled to judgment in respect of all the fifteen cheques.

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(1) [1914] 3 K. B. 356.
(2) [1924] 1 K. B. 775.
(3) [1929] 1 K. B. 40.
(4) [1930] A. C. 659.
(5) [1929] A. C. 176.

[The bank were not called upon on the cross-appeal.]

Rayner Goddard K.C. replied.

The House took time for consideration.

1932. Feb. 29. LORD ATKIN. My Lords, this case arises out of the fraudulent acts of Lord Terrington, who, in 1922 and during the relevant period, was practising as a solicitor in Clarges Street in the name of H. J. S. Woodhouse & Co. He had as a client Sir Harold Reckitt, now deceased, whose legal representatives are the respondents to the present appeal. Sir Harold Reckitt appears to have been a wealthy man in the habit of spending part of his time abroad. He employed Lord Terrington as his solicitor. In 1915 Sir Harold, being engaged in Red Cross work in France, gave Lord Terrington, then Mr. Woodhouse, a power of attorney in limited form which did not include a power to draw cheques on his account. It was considered desirable that Lord Terrington should possess this particular power; and it was given by a letter dated August 17, 1915, written by Sir Harold to his bankers, Barclays Bank, at Hull, empowering Lord Terrington to draw cheques upon the account at Hull "without restriction." In 1922 the original form of power of attorney which had been renewed from time to time was superseded by an extended form which expressly gave power to the attorney to draw cheques on the principal's banking account and to apply moneys for the purposes of the principal; but it does not appear that the general terms of the letter of August 17, 1915, were in any way modified or that Barclays Bank were even informed of the extended power of attorney. The power of attorney of 1922 was renewed from time to time and was in force during all times relevant to this action. Lord Terrington to Sir Harold Reckitt's knowledge acted under the power of attorney at all times, whether Sir Harold Reckitt was in the country or not. Both principal and attorney, therefore, drew upon Barclays account at Hull, a great number of cheques being drawn in the ordinary course by each of them. Lord Terrington drew cheques on cheque books supplied by Barclays Bank at the cost of the principal, signing the cheques on an impression made by a rubber stamp containing in the upper line "Harold G. Reckitt by" and on the lower line "his attorney" and placing his own signature between the lines, so that the completed signature on each cheque ran "Harold G. Reckitt by Terrington, his attorney."

In 1926 it was discovered that Lord Terrington had been in the habit of fraudulently drawing cheques for his own purposes on Sir Harold Reckitt's account. Twenty such cheques had been paid into Lord Terrington's account with the appellant bank. In respect of fifteen of these cheques, amounting in all to 17,890*l.*, dated at different periods between May 15, 1922, and February 20, 1926, Sir Harold Reckitt brought the present action claiming the amount mentioned as damages for the conversion of the cheques. The bank, denying the conversion, relied upon s. 82 of the Bills of Exchange Act, 1882, alleging that the cheques were crossed cheques and that they had received payment of them for a customer in good faith and without negligence. As to two of the cheques, they also said that they were holders in due course. Rowlatt J. decided in favour of the bank on the issue of negligence; the Court of Appeal decided against the bank in respect of all the cheques except the first two and gave judgment against the bank for 13,490*l.* The bank appeal from the judgment of the Court of Appeal and the respondents cross-appeal seeking to have judgment for the whole 17,890*l.* For the purpose of determining the issues so raised, it is necessary to state the circumstances in which the cheques came into existence.

Since 1899 Lord Terrington and his predecessors had had a banking account with the Cornhill branch of the appellant bank. In 1922, the first of the material years, Lord Terrington had two accounts, No. 1 and No. 2. They were both in the firm name, Lord Terrington being at this time the sole member of the firm. No. 1 account appears to have been used almost exclusively for meeting private expenditure; No. 2 seems to have been the business account. No. 1 account was, except for a short interval, always overdrawn. No. 2 account was throughout, except for a short interval, in credit. The net balance from time to time varied, at times being a credit, at others a debit. It is clear that the manager was never completely satisfied with the position of the account. It gave him "a certain amount of anxious care." The overdraft on No. 1 account was, at one time at any rate, considered by the bank not to be protected by the credit of No. 2. A solicitor's No. 2 account they thought was generally made up of clients' money: and, though Lord Terrington gave them assurances as to this, with which they said at the trial they were satisfied, it is obvious that the uneasiness never ceased. In January, 1923, acting it is said on legal advice, they took what they call an hypothecation form in which the customer charged any moneys standing in his name to the credit of any account with the repayment of the moneys owing on any account. How this increased their rights if the money was the customer's money, or gave them any rights if the money was clients' money, it is perhaps not necessary to discuss. A reference to some of the earlier communications between the bank and Lord Terrington will suffice. In January, 1922, the bank record that at an interview Lord Terrington arranged that he would keep his overdraft on No. 1 account much smaller in the future and that they were to advise him in writing before the figures got large. On February 17 Lord Terrington is informed that No. 1 account stands overdrawn 1129*l.*, which perhaps he would arrange to cover. On February 24 it is 1274*l.* and his kind attention would greatly oblige. On April 4, 1922, at an interview the bank pointed out that they did not care about No. 1 being consistently overdrawn against No. 2, "the reason being that it is commonly understood that a solicitor's No. 2 account is commonly made up of clients' money. Lord Terrington did not agree to this, but after some conversation said that he would place his No. 1 account in credit." On May 9, 1922, the bank write that No. 1 was

1905*l.* overdrawn and would he kindly let them have a transfer from No. 2 to put No. 1 in credit. On May 15, 1922, the bank write a stiff letter: "We would again draw your attention to the accounts of Messrs. Woodhouse & Co., No. 1 account overdrawn 2168*l.* . . . . As we mentioned to you recently, our Head Office insist that these accounts should be kept in credit and we would ask you to be good enough to see that the present overdrafts are covered without delay and that the accounts are kept in credit in future." Nevertheless No. 1 account continued to be overdrawn, and from time to time the net balance on both accounts was in debit. In January, 1923, as I have said, the bank took an hypothecation form over No. 2, though with some doubts as to what their position would be in the event of bankruptcy. For the remainder of 1923 the account appears to have been kept to the satisfaction of the bank. In January, 1924, the bank were a little uneasy at being asked to pay some 600*l.* worth of cheques, making the total of the two accounts overdrawn to that extent, on the strength of the promise of a cheque of 1000*l.* due on a completion. The cheque, however, duly arrived a day late. In February comes the first of the transactions in which the bank have been found to be liable. On February 23 the bank write to their customer that with reference to their telephone conversation of the previous afternoon the net overdraft on his accounts amounted to some 250*l.* and they would be obliged for his attention early on Monday morning. On February 23, a Saturday, Lord Terrington drew a cheque for 500*l.* on Sir Harold Reckitt's account, dated February 25, in favour of Messrs. H. J. S. Woodhouse & Co. or order, drawn as attorney in the form above described, and he enclosed it duly endorsed in a letter to the bank on February 23 with another cheque of 23*l.* "for credit No. 2 account, H. J. S. Woodhouse & Co."

The drawing of this cheque was a fraud on Sir Harold Reckitt. It was not drawn to put the attorney in funds in respect of any past or future expenditure on behalf of his principal. In simple language the attorney stole the money and applied it to his own purposes—in fact to pay his debt

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to the bank. On March 11 the bank wrote that the firm's account frequently goes into debit, for which there is no arrangement, and at the present time is overdrawn some 88*l.*, and they would be glad of his attention, and think it very desirable they should have an interview. On March 13 Lord Terrington sent a cheque for 400*l.* drawn as the last; the accounts on the evening before were on balance overdrawn 240*l.* On March 14 the bank wrote: "Having regard to the circumstances last evening we must ask you in future to be good enough to see that we are provided with funds to meet any cheques that are presented in your firm's account, as we cannot undertake to overpay the account, nor can we accept the responsibility of notifying you that funds are insufficient to meet your drawings." On March 21 there was an important interview. The bank asked Lord Terrington to transfer sufficient funds from No. 2 account to wipe out the debit balance on No. 1 account. They asked what was the cause of the account being constantly overdrawn and asked that arrangements should be made to keep it in credit. Lord Terrington replied that he had some 15,000*l.* owing to him by clients. Such debts were all good, but he was unable, owing to pressure of business, to send out the necessary accounts. He does not appear to have suggested to the bank, nor would it have been the fact, that he had made any disbursements from his own account on behalf of Sir Harold Reckitt, which he could as attorney repay himself. There is no evidence that at any time the bank knew that Lord Terrington acted on any occasion as Sir Harold Reckitt's solicitor. The same day he sent the bank a cheque for 450*l.* drawn on Sir Harold Reckitt's account as before. At the end of the day before the interview No. 1 account was in debit 5190*l.*; there was a credit balance on the two accounts combined of 197*l.* On March 28 there was another somewhat acrimonious interview when the combined overdraft was about 300*l.*, and on March 31 Lord Terrington sent another Reckitt cheque for 400*l.* On April 8, the combined overdraft being 1253*l.*, Lord Terrington, after another reminder from the bank, sent another Reckitt cheque for 250*l.*

It is convenient, I think, to pause here and survey the legal relations of the parties in respect of this group of five cheques, amounting to 2000*l.*, which in the course of forty-three days were paid in to his account by Lord Terrington. The Court of Appeal, rightly as I think, came to the conclusion that the rights of the parties would be determined by the view taken as to these particular transactions. In the first place Lord Terrington had no actual authority to draw these cheques at all or to receive the proceeds. His only actual authority was to draw cheques for his principal's purposes. Accordingly, if it can be supposed that Sir Harold Reckitt found Lord Terrington standing at the counter of the bank waiting to pay in one of the cheques he could, if he knew the true facts, have demanded the immediate delivery of the cheque to him. It was his property, and Lord Terrington had no title to it. In these circumstances I have no doubt that the bank in presenting and receiving payment for the cheques converted them. I venture to quote words of my own used in *Underwood's* case (1) merely because they seem to me applicable and I cannot express the idea in simpler language: "The bank so disposed of the chattels, the cheques, as to deprive both themselves and the true owners of the dominion over them, and in exchange for the pieces of paper constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion." It is quite irrelevant to the issue of conversion that after payment the pieces of paper came into possession of the paying bank to be held as vouchers on account of the true owner, Sir Harold Reckitt. This position existed in the case of *Morison* v. *London County and Westminster Bank, Ld.* (2), where the collecting bank were held to have converted the cheques.

The only question therefore is whether the bank have established that they received payment in good faith and without negligence and so brought themselves within s. 82 of the Bills of Exchange Act, 1882. Their good faith is not challenged. The issue therefore is confined to negligence, and the onus of proving the absence of negligence is plainly

(1) [1924] 1 K. B. 775, 795.

(2) [1914] 3 K. B. 356.

cast upon the bank. But for the section they are liable for conversion, and it is for them to bring themselves within the statutory protection. My Lords, it appears to me, when the facts are examined, that this case differs not in principle from *Reckitt* v. *Barnett, Pembroke & Slater, Ld.* (1), where Lord Terrington drew a cheque as attorney on Sir Harold Reckitt's account in payment of a motor-car supplied to himself. It was held that the vendors were liable to Sir Harold for the amount of the cheque. Lord Carson shortly states the conclusion of all the members of the House when he says: "It is clear (1.) that the cheque was used to liquidate the private debt of Lord Terrington, (2.) that the defendants knew it was so used, and (3.) that the form of the cheque gave them notice that the money was not the money of Lord Terrington. In that state of circumstances there is no evidence or any possible inference which can be drawn that the agent was applying his principal's money in discharge of any possible liability of his principal." Precisely the same state of things exists here. Lord Terrington was applying these cheques in part payment of his overdraft—i.e., of money lent to him by the bank. The bank knew that he was doing so; indeed it was at their repeated request that he made the payments. They had the same notice in the form of the cheque that the money was not the money of Lord Terrington. There is in the same way no evidence and no possible inference that he was applying this money in discharge of any possible liability of his principal. It seems to me clear that in an omission of an ordinary business precaution, in breach of a plain duty imposed upon a creditor to take reasonable care to see that a known agent paying his own debt to his creditor out of his principal's money is acting within his authority, the bank were negligent in making no inquiry as to their customer's authority to make these payments. I doubt whether he could have satisfied such inquiries however superficially made. Even if he had answered the first inquiry the mere fact that the bank showed themselves to be on their guard would probably

(1) [1929] A. C. 176, 191.

have stopped the frauds. But, be this as it may, no inquiry in fact was made and the bank fail to show that they acted without negligence. The form of the cheque, as has been pointed out, necessarily points to the money being Sir Harold Reckitt's money. But to make the matter clearer s. 25 of the Bills of Exchange Act, 1882, expressly provides that " A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." It seems to be suggested in the judgment of Lord Reading C.J. in *Morison's* case (1) that the operation of this section was limited to the time before the instrument was honoured, but that after a bill so signed in excess of authority has been honoured s. 25 did not confer a right to recover the proceeds. If the words used meant to mark off a definite period within which alone the section affects legal rights, I see no ground for such a distinction. The effect of the statute is to give notice of limited authority on the face of the document, and this operates as and when the document is negotiated or delivered. The legal consequence of such notice may be to prevent the holder who obtains payment from supporting his right to have received payment. The case of *Reckitt* v. *Barnett, Pembroke & Slater, Ld.* (2), is a good instance. The rights in respect of a bill after payment are no doubt matters of special consideration ; but whether before or after payment the fact that the bill contains on the face of it notice of limited authority to place on it the particular signature continues to be a fact affecting pro tanto the rights of the parties both before and after payment. What effect, if any, such notice has on an intermediate holder for value it is unnecessary to discuss.

As to the remainder of the cheques in respect of which the plaintiff succeeded in the Court of Appeal, I find it unnecessary to discuss the facts in detail. In most cases the account was overdrawn, but not in all. In some cases only had there been pressure by the bank. But I agree with

(1) [1914] 3 K. B. 356.

(2) [1929] A. C. 176.

the view taken in the judgments below, that the bank's position was affected by the transactions in 1924, and the notice and negligence then found to have existed must be taken into account when considering the subsequent transactions. When all the relevant facts are so considered, I think the Court of Appeal were right in concluding that, in respect of these cheques also, the bank had not discharged the onus of disproving negligence.

With regard to the first two cheques complained of, in respect of which the Court of Appeal decided in favour of the bank, I have, after some doubt, come to the conclusion that the decision should not be altered. There was the same lack of actual authority as in the other cheques and the same notice; but the cheques were not specifically drawn to meet claims of the bank. They were drawn in one case to fictitious payees, Pearson & Co.; in the other case to Woodhouse & Co.; but in both cases a cheque of equivalent amount was drawn out practically simultaneously—in the first to Pearson & Co., in the second to one Buxton, with whom Lord Terrington seems to have had some joint adventure. They appear to have been the first cheques drawn fraudulently by the solicitor, and upon the whole I see no ground for differing from a decision that in these two cases the bank acquitted themselves of negligence.

It remains to deal with contentions of the bank based upon the terms of the power of attorney. The bank never in fact asked for or saw the terms of the document; and, for my part, I venture to doubt whether in such circumstances they could ever rely on any other than an actual authority. Ostensible authority appears to be excluded when the party averring it cannot show that any appearance of authority other than the actual authority was ever displayed to him by the principal. He neither shows a representation nor that he relied on it. But in this case, as the members of the Court of Appeal have pointed out, the notice found to exist defeats reliance on ostensible equally with actual authority. Neither in the one case nor in the other can the agent be assumed to have authority to pay his own debts with his principal's money. It was said, however, that the clause of the power of attorney whereby the principal "ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do or purports to do by virtue of these presents" protects the bank. The clause in some such form is of long standing. It does not appear to be happily worded; for a ratification in advance seems to contradict the essential attributes of ratification as generally understood. It cannot, I think, be construed as extending the actual authority given by the power of attorney; it may amount to a promise to adopt acts done within the ostensible authority; and this strengthens the position of those who rely on the ostensible authority by an express promise as well as by an estoppel. If this be so it is difficult to see how the promise could be available except to some one who was aware of it and who acted on the strength of it. But in any case it would appear to be a highly improbable construction to suppose that a principal using this form has precluded himself from objecting to a dealing with his property by a person who had notice in ordinary circumstances that the agent was exceeding his authority actual and ostensible. It would mean that the principal was saying either "I give you actual authority within defined limits but ostensible authority to do what you like with my property so long as you pretend ('purport') to be doing it under this document"; or "I give you similar actual authority." Such a construction would make powers of attorney a danger instead of a business facility and would certainly defeat the intention of any reasonable principal. I think, therefore, that the notice in this case defeats this defence.

The cheques on which the bank have been held liable were crossed and marked not negotiable, except two—March 13, 1925, Lloyds or bearer, 1000*l.*, and February 20, 1926, Woodhouse & Co., 390*l.* As to these two, the bank claim to be holders in due course to the extent of the overdraft existing when they were paid in. That they were holders for value to that extent is, I think, true whether the value is said to be the payment of the antecedent debt (the overdraft), or to be the lien to the extent of the overdraft (Bills of Exchange Act, 1882, s. 27, sub-s. 3). But the notice already referred to defeats their right to be considered holders in due course. In other respects it was not suggested that there would be any difference between these and the other cheques following the group which I have discussed in detail.

For the above reasons I think that the appeal and cross-appeal should be dismissed, with costs.

My Lords, I am asked to say that my noble and learned friend, Viscount Dunedin, and my noble and learned friend, Lord Thankerton, concur in the judgment which has been delivered.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Atkin, and I concur in it.

LORD MACMILLAN. My Lords, I also concur.

Order of the Court of Appeal affirmed and original and cross-appeals dismissed with costs.

Lords' Journals, February 29, 1932.

Solicitors for the appellants in the appeal and respondents in the cross-appeal: *Coward, Chance & Co.*

Solicitors for the respondents in the appeal and appellants in the cross-appeal: *Nicholl, Manisty & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
June 28.

CELLULOSE ACETATE SILK COMPANY, LIMITED . . . . . . APPELLANTS;

AND

WIDNES FOUNDRY (1925), LIMITED . RESPONDENTS.

Contract—Construction—Measure of Damage—Delay—Weekly Sum agreed as Penalty—Liquidated Damages—Inadequacy.

A contract for delivery and erection of an acetone recovery plant provided that, if the work were not completed within a certain time, the contractors should pay to the purchasers by way of penalty a sum of 20*l.* for every week that they were in default. The contractors were thirty weeks late in completing the work. In an action by them against the purchasers for the contract price, the defendants counterclaimed 5850*l.*, the actual loss they had suffered through the delay.

Held, that the sum of 20*l.* a week was the full amount that the plaintiffs agreed to pay towards compensation to the defendants for delay in completing, and that they were liable for 600*l.* and no more.

Decision of the Court of Appeal [1931] 2 K. B. 393 affirmed.

APPEAL from the decision of the Court of Appeal (1) varying a judgment of Wright J. on a counterclaim to an action commenced by the Widnes Foundry (1925), Ld., to recover the price agreed to be paid by the Cellulose Acetate Silk Co., Ld., for the installation of an acetone recovery plant supplied by the Widnes Foundry (1925).

The facts are fully stated in the speech of Lord Atkin. The contract between the parties was contained in a specification and acceptance dated March 8, 1929. The contract price for the work was 19,750*l.* By clause 9 of the specification the plaintiffs were to deliver and erect the plant in eighteen working weeks from receipt of final approval of their drawings. By clause 10, if this period of eighteen working weeks was exceeded the plaintiffs were "to pay by way of penalty the sum of 20*l.* per working week" over and above the eighteen weeks, subject to events beyond their control. The plaintiffs were thirty weeks late in

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

(1) [1931] 2 K. B. 393.

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finishing the work. They claimed the contract price, 19,750*l.*, and judgment was given them for that sum. The defendants counterclaimed for the delay and contended that the sum of 20*l.* a week mentioned in clause 10 of the specification was in the nature of a penalty, and that they were entitled to recover the actual loss they had suffered. The plaintiffs insisted that the weekly sum of 20*l.* was an agreed assessment of the damages to the defendants in case of delay, and they paid 600*l.* into Court. The learned judge at the trial upheld the contention of the defendants and, having assessed their actual loss at 5850*l.*, he gave judgment for the defendants for that amount.

On appeal by the plaintiffs the Court of Appeal (Scrutton, Greer and Slesser L.JJ.) held that the sum of 20*l.* a week was liquidated damages, and set aside the judgment of Wright J. on the counterclaim.

The defendants appealed.

1932. May 26, 27. *A. M. Sullivan K.C.* and *G. J. Paull* for the appellants.

Archer K.C. and *H. O'Hagan* for the respondents were not called on.

The House took time for consideration.

1932. June 28. LORD ATKIN (read by Lord TOMLIN). My Lords, the question in this case arises on a counterclaim by the appellants in an action in which they were sued by the respondents for the price agreed to be paid by the defendants for the installation of an acetone recovery plant supplied by the plaintiffs. The defendants claim that the contract specified delivery and erection within eighteen months of the approval by them of the plaintiffs' drawings: that the time expired on July 27, 1929, and the plant was not delivered and erected until February 10, and they claim substantial damages for delay. The learned judge at the trial found that the plaintiffs had broken the contract: that it was not completed until January 3, 1930; and he assessed the damages at 5850*l.* The plaintiffs relied upon two clauses in the contract which provided: "9. You to deliver and erect in 18 working weeks from receipt of final approval of your drawings. 10. If this period of 18 working weeks is exceeded you to pay by way of penalty the sum of 20*l.* per working week for every week you exceed the 18 weeks subject to the usual strike, lockout and general conditions beyond your control." This clause, they say, fixed the damages for delay, and they paid into Court 600*l.* to cover thirty weeks' delay. The Court of Appeal held that this clause was a clause liquidating the damages, and that the defendants could not recover more than 20*l.* a week over this period of delay.

The defendants, whom I will call the Silk Company, were in 1929 erecting a large plant for producing artificial silk. By this process the silk is produced from acetate, an important ingredient in which is acetone. The acetone in the process of manufacture is substantially all evaporated, and if nothing is done for its recovery there is a very substantial money loss, for acetone at this time cost about 76*l.* a ton, and it takes three tons of acetone to produce one ton of silk. The Foundry Company were the manufacturers of a recovery plant which they claimed, and apparently with reason, was capable of recovering about 90 per cent. of acetone evaporated.

At the beginning of 1929 the Silk Company began negotiations with the Foundry Company for the erection of a recovery plant in connection with the Silk Company's spinning plant. The Silk Company intended to begin production in August: it was commercially important to produce samples of their products in October for use the next spring. If they began spinning in August without their recovery plant it was obvious that they would be losing the cost of their acetone, as above described. It is plain that early in the negotiations they explained their position to the Foundry Company, who thoroughly understood it.

It is necessary now to discuss the documents which eventually constituted the contract: for a correct appreciation of these appears to make the solution of the question reasonably simple. On February 16 the Foundry Company sent the Silk Company a quotation for an acetone plant for the recovery of six tons of acetone per day of twenty-four hours. There was an elaborate specification. The price quoted for the plant delivered and erected upon the Silk Company's foundations at Lancaster was 15,250*l.* For a 9-ton plant they quoted 18,000*l.*, and for a 12-ton plant 19,500*l.* The quotation was apparently on a form which on the face had "For conditions see back," and on the back were printed a number of general conditions, of which it is only necessary to set out 9 and 10. "9. Delivery. With regard to delivery: Every effort will be made within our power to complete the work in the time specified in our tender from receipt of order with full and final particulars to enable the work to be put in hand. Delays due to force majeure or other causes beyond our control always excepted, such as fires, floods, strikes, riots, lockouts, accidents in our works, or in those furnishing us with material, and delays in transport. 10. Completion and penalty for delay. The time given for delivery and completion are to date from receipt by us of a written order to proceed and of all the necessary information and approval of drawings to enable us to put the work in hand. We will use our best endeavours to keep to the dates given, but will accept no liability for failure to do so."

There are further provisions for matters usually dealt with in such contracts, liability for accidents and dangers, guarantee, patents, arbitration, and so forth.

The original quotation made no reference to time of delivery. A conversation followed in which the representatives of the Foundry Company suggested nine months from approval of the drawings; the representatives of the Silk Company pointed out their position and that they could not give the order unless they could get delivery in August. The Foundry Company said that, if so, they must ask for a further 500*l.*, as they would have to put on a night shift. The parties had already agreed that the plant should be a 12-ton plant for 19,250*l.*, so that the price would become 19,750*l.* The Silk Company agreed to this, but said they must ask for a penalty of 20*l.* per week, to which the Foundry Company agreed. Eventually after correspondence and interviews the Foundry Company write on March 5: "Acetone Recovery Plant, 12 tons per day of 24 hours. Confirming interview of Saturday last at your works in reference to the above plant, we hereby accept your order on the following conditions." Then are set out a number of numbered terms which include terms 9 and 10, which I have already mentioned, for delivery in eighteen weeks, and for a 20*l.* penalty. The letter is written on the tender form, which has the original conditions printed on the back, and a reference to them on the face. So far there does not appear to have been a definite order given by the Silk Company. After a query by the Silk Company as to terms of payment, the Foundry Company, on March 6, 1929, write: "Our Ref. R.W.H./D.H. Further to our letter of the 5th, we beg to make the following comments." They then deal with the terms of payment and conclude "We look forward to receiving your official order to proceed with the work." On March 8 the Silk Company send the official order. It is written on four sheets numbered consecutively of the Silk Company's ordinary order form and begins: "Please supply the following goods in accordance with your quotation No. R.W.H./D.H. dated March 6, 1929. One acetone recovery plant with a capacity of 12 tons per day of 24 hours. . . . . Subject to the following price, conditions and guarantee." It then sets out the numbered conditions as in the Foundry Company's letter of March 5, except that the actual amounts of each payment are set out, and of the price 1200*l.* is expressed to be for erection. It contains no reference to general conditions, or to any document which contains a specification of the plant ordered. However, on March 12 the Foundry Company reply: "We beg to acknowledge receipt of your order of the 8th inst. for Acetone Recovery Plant for which we thank you. Same to be in accordance with our tender and specification and terms set forth therein." It appears reasonably clear that the contract is to be found in the documents I have referred to; and that part of the terms consist of the printed conditions modified of course by the stipulation expressly agreed to by the parties in writing.

What then is the effect of clause 10? "If this period of 18 weeks is exceeded you to pay by way of penalty the sum of 20*l.* per working week for every week you exceed the 18 weeks." I entertain no doubt that what the parties meant was that in the event of delay the damages and the only damages were to be 20*l.* a week, no less and no more. It has to be remembered that the Foundry Company's business in this respect was to supply an accessory to a large business plant for which they had no responsibility. The extent of the purchasers' business might be enormous; their expenses were beyond the sellers' control; and it would be a very ordinary business precaution for the sellers in such a case to say: "We will name a date for delivery but we will accept no liability to pay damages for not observing the date; for if we were by our default to stop the whole of your business the damages might be overwhelming in relation to our possible profit out of the transaction. We won't incur any such risk." This precaution the prospective sellers took in their printed Condition 10. They definitely negative any liability for delay. The purchasers have ample notice of this in the first quotation form sent to them on February 16. The purchasers pressed for an earlier date; they got it, and getting it without more they would still only have a business firm's assurance of delivery by that date; they would still be unable to claim damages from them for breach. The sellers ask for an addition to the price in order to enable them to give the earlier delivery; the buyers ask for some compensation if they do not get the delivery they want. It is agreed at 20*l.* per week of delay. It appears to me that such sum is provided as compensation in place of the no compensation at all which would otherwise have been the result. Except that it is called a penalty, which on the cases is far from conclusive, it appears to be an amount of compensation measured by the period of delay. I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both the parties that the actual damage would be much more than 20*l.* a week; but it was intended to go towards the damage, and it was all that the sellers were prepared to pay. I find it impossible to believe that the sellers who were quoting for delivery at nine months without any liability, undertook delivery at eighteen weeks, and in so doing, when they engaged to pay 20*l.* a week, in fact made themselves liable to pay full compensation for all loss.

For these reasons I think the Silk Company are only entitled to recover 20*l.* a week as agreed damages; and that the decision of the Court of Appeal was correct and should be affirmed. In these circumstances I find it unnecessary to consider what would be the position if this were a penalty. It was argued by the appellants that if this were a penalty they would have an option either to sue for the penalty or for damages for breach of the promise as to time of delivery. I desire to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages. In the present case the only result of ignoring the penalty might be that the defendants would find themselves confronted with a contract which by Condition 10 deprived them of any compensation at all.

An attempt was made to contend that in any case the defendants were entitled to sue for breach of a collateral contract by the Foundry Company to work a night shift on this job. The learned judge appears to have negatived such a collateral contract. In this in my judgment he was plainly right. The negotiation as to working at night was part of the negotiation for the main contract. The alleged consideration for it, 500*l.*, is expressed in the main contract as part of the whole consideration, and there is no corresponding promise to be found in that contract. It seems impossible to find that any collateral contract existed.

In my opinion the appeal should be dismissed with costs.

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Lord Warrington of Clyffe. My Lords, I have read and considered the opinion of my noble and learned friend Lord Atkin, and I concur therein.

Lord Thankerton. My Lords, I also concur in that opinion.

Lord Tomlin. My Lords, I am asked to state that my noble and learned friend Lord Macmillan concurs in the opinion which has been read, and I myself also concur therein.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 28, 1932.

Solicitors for the appellants: *Gedge, Fiske & Co.*
Solicitors for the respondents: *Hall, Brydon & Chapman.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
June 28.

PENRIKYBER NAVIGATION COLLIERY COMPANY, LIMITED . . . . . APPELLANTS;

AND

EDWARDS . . . . RESPONDENT.

Workmen's Compensation—Miners' Nystagmus—Medical Referee's Certificate as to Nature of Incapacity—Ambiguity—Conclusiveness—Contradictory Certificate of Certifying Surgeon—Admissibility—Official Form of Order of Reference—Adequacy—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 12, *sub-s.* 3; 19, *sub-s.* 3; 43.

A workman was certified as suffering from miners' nystagmus on October 17, 1920, and was thereafter paid compensation by his employers till January, 1930. In February, 1930, the employers obtained a certificate from the medical referee that the workman was not then suffering from miners' nystagmus, but from defective vision due to other causes therein specified, and that his condition was such that his sight was not good enough for underground work, but only for work on the surface. In March, 1930, the workman obtained a certificate from the certifying surgeon that he was then suffering from miners' nystagmus and that the disablement commenced on October 17, 1920, no change having occurred in the workman's condition in the interval between the two certificates, and on this certificate the workman applied for arbitration. The arbitrator held that the certificate of the medical referee was conclusive and refused compensation, but the Court of Appeal set aside his award. During the hearing of the appeal in the House of Lords their Lordships remitted the case to the arbitrator to ask the medical referee whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it. The medical referee in reply, after stating that the fact that the workman had had an attack of miners' nystagmus showed that he was a man who was predisposed to the disease, said that his certificate meant that he had now recovered from miners' nystagmus, but that he was likely to develop a second attack sooner or later if he went underground, and in much shorter time than it took to produce the first attack:—

Held, reversing the decision of the Court of Appeal, that the certificate was one of complete recovery and could not be contradicted by a finding which was incompatible with complete recovery.

Prendergast v. *Lancaster's Steam Coal Collieries, Ld.* (1925) 18 B. W. C. C. 494 observed upon.

**Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

Wilsons and Clyde Coal Co., Ld. v. *Burrows* [1929] A. C. 651, and *Connor* v. *Cadzow Coal Co., Ld.* [1932] A. C. 1 discussed.

Form of Order of Reference settled by the Secretary of State criticized as inadequate.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Slesser L.JJ.) setting aside an award made by the county court judge of Glamorganshire under the Workmen's Compensation Act, 1925, in favour of the appellants, the employers.

The question raised by the appeal was whether the appellants were entitled to rely upon a certificate given by a medical referee under s. 19, sub-s. 3, of the Act to the effect that the respondent's incapacity was not due to miners' nystagmus as conclusive evidence in regard to the matters so certified.

The facts are fully set out in the opinion of Viscount Dunedin and are summarized in the headnote.

1932. March 15, 17, 18. *Sir Walter Greaves-Lord K.C.* (with him *Edgar Dale*) for the appellants. Here there is no ambiguity in the report of the medical referee. It says that the workman is not suffering from nystagmus, but is suffering from some other disability unconnected with his employment. The new certificate is a direct contradiction of the medical referee's report and is not admissible, it being admitted that the workman is not attempting to set up any new claim. The authorities show that suffering from a disease includes proneness to a recurrence resulting from the original outbreak of the disease.

[He referred to *Starkey* v. *Clayton & Sons* (1); *Evans & Co.* v. *Scahill* (2); *Wilsons and Clyde Coal Co.* v. *Burrows* (3); *Lewis* v. *Tredegar Iron and Coal Co.* (4); *Wilsons and Clyde Coal Co.* v. *Flynn* (5); *M'Dougall* v. *Summerlee Iron Co.* (6); *Connor* v. *Cadzow Coal Co.* (7); *Prendergast* v. *Lancaster's Steam Coal Collieries, Ld.* (8)]

(1) (1925) 18 B. W. C. C. 346.
(2) (1927) 20 B. W. C. C. 348.
(3) [1929] A. C. 651.
(4) (1929) 22 B. W. C. C. 268, 272.
(5) [1930] A. C. 516.
(6) 1927 S. C. (H. L.) 72; 20 B. W. C. C. 419, 425.
(7) [1932] A. C. 1, 6.
(8) (1925) 18 B. W. C. C. 494.

Upjohn K.C. (with him *Kirkhouse Jenkins K.C.* and *Joshua Davies*) for the respondent. It is conceded that the medical referee's report was conclusive as to the condition of the workman at the time and as to his fitness for his employment. But it left the workman at liberty to apply, in the case of a recrudescence of the disease, for compensation by arbitration. In that case the workman must show that since the date of the report there has been a recrudescence due to the employment. The respondent is contending for the right to go on with the arbitration in the proper course. The medical referee's report does not cover recrudescence. No case of nystagmus can be found in which the medical referee has certified complete recovery. The certificate is conclusive only on the day on which it is given. Therefore it was the duty of the arbitrator to take the evidence of the workman. If the certificate is ambiguous it should be sent back to know what the medical referee intended to certify.

[The case was remitted to the county court to ascertain from the medical referee whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before. The medical referee having replied to this question the hearing of the appeal was resumed. on May 10.]

Upjohn K.C. continuing. On these two documents—the certificate and the explanatory note—there is nothing to preclude the susceptibility to a second attack of nystagmus arising from the first attack.

The House took time for consideration.

1932. June 28. VISCOUNT DUNEDIN. My Lords, the history of this case is as follows :—

The respondent is a miner. In 1920 he was in the employment of the appellants and worked underground in a colliery belonging to them. On October 17, 1920, he obtained a certificate from the certifying surgeon that he was suffering from miners' nystagmus. That certificate has been lost, but no question is raised as to the truth of the fact that it was so granted. The date of disablement was stated to be October 17, 1920. The respondent was then paid compensation on the basis of total incapacity up to June, 1924. On that date he was given work above ground at a lower wage and was therefore paid compensation on the basis of partial incapacity.

On September 26, 1926, the appellants served on him a medical certificate that he had entirely recovered from the accident. The examination on which this certificate proceeded was made in terms of para. 14 of the First Schedule of the Act of 1906. This was met, on September 30, 1926, by a certificate to the contrary effect by the workman's doctor. The matter was then referred to Mr. Cresswell, a medical referee, and he, on October 20, 1926, certified that the respondent was still suffering from miners' nystagmus. The appellants then continued to pay partial compensation. This state of affairs continued until January 14, 1930, when the appellants served on the respondent a notice that, in ten days' time, they would cease to pay compensation, and they enclosed a certificate from a doctor that he had wholly recovered and that his incapacity was no longer due to the accident. This was met by a counter certificate which, though so badly worded—" He has not partially recovered " —obviously meant that he had not fully recovered.

Upon this, the appellants lodged an application to the county court for a reference to a medical referee—" pursuant to s. 12, sub-s. 3, and s. 19 of the Workmen's Compensation Act, 1925," and prayed that :—

" The said Penrikyber Navigation Colliery Company Limited request that an Order may be made referring the matter to a medical referee for his certificate upon the following questions :—

(*a*) Whether the said Evan Edwards has wholly recovered from his said nystagmus ;

(*b*) Whether the said Evan Edwards is fit for his ordinary, and if not what other work ;

(*d*) Whether and to what extent—if any—the incapacity of the said Evan Edwards is due in whole or in part to his said nystagmus."

Upon this an order of reference was made.

My Lords, I think it necessary to set out the order at length. It did not tally with the request as made by the appellants, and it did not do so because it followed the form settled by the Secretary of State. It was as follows: "On the application of the Penrikyber Navigation Colliery Company, Limited, of Penrhiwceiber (a copy of which is hereto annexed), I hereby appoint Mr. F. P. S. Cresswell, of 24, Windsor Place, Cardiff, one of the Medical Referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1925, to examine the said Evan Edwards (hereinafter called 'the said workman') and to give his certificate as to the condition of the said workman and his fitness for employment, specifying if necessary the kind of employment for which he is fit (*or* his certificate whether (*or* to what extent) the incapacity of the said workman is due to the accident) (*or* his certificate as to the condition of the said workman and his fitness for employment, specifying if necessary the kind of employment for which he is fit, and as to whether (*or* to what extent) the incapacity of the said workman is due to the accident)." I think it must be pointed out to the proper authority that the form is not adequate for all cases, as it does not put specifically the question of recovery from the accident. In other words, it obviously follows the provisions of s. 19 without noticing that there may be an application which is based, not on s. 19 alone, but also on s. 12, sub-s. 3, proviso 1. This omission is apt to cause, as it has caused here, questions of difficulty to arise which might not have arisen had the form been adequate.

On February 15, 1930, the medical referee, being the same gentleman (Mr. Cresswell) who had made the report in 1926, gave his report to the following effect:—

"(1.) The said Evan Edwards is not now suffering from miners' nystagmus, but from defective vision due to cataract and old inflammation of the eyes, and his condition is such that his sight is not good enough for underground work, but only for work on the surface.

(2.) The incapacity of the said Evan Edwards is not due to miners' nystagmus, but to other defects mentioned above."

The appellants accordingly discontinued the payments. On March 27, 1930, the respondent obtained a report from the certifying surgeon for the district that he was suffering from miners' nystagmus and was disabled from earning full wages, and that the disablement occurred on October 17, 1920. Upon this report the respondent applied for arbitration. Arbitration was held. The arbitrator examined the respondent but refused to hear other witnesses. The appellants pleaded that the matter was concluded by the certificate of the medical referee. The arbitrator decided in favour of the appellants and refused to award compensation. Appeal was taken to the Court of Appeal, who reversed the judgment of the arbitrator and remitted to him to proceed with the case.

Appeal has now been taken from that judgment to your Lordships' House. The Court of Appeal proceeded on the view that the case was ruled by their own judgment in *Lewis* v. *Tredegar Iron and Coal Co.* (1), and that that decision was not affected, as the county court judge as arbitrator had held, by the case of *Wilsons and Clyde Coal Co.* v. *Flynn.* (2)

My Lords, it is much to be regretted that neither the county court judge nor the Court of Appeal had their attention directed by the Bar before them to two more recent cases in this House: *Wilsons and Clyde Coal Co.* v. *Burrows* (3) and *Connor* v. *Cadzow Coal Co.* (4), without a consideration of which it is impossible to determine the present question. Indeed, this omission is so grave as to make it useless to canvass the judgment of the Court of Appeal as it stands. Had these cases been before the Court of Appeal I am quite unable to say what their judgment would have been. When the case was first heard before your Lordships, it seemed to your Lordships desirable that there should be no doubt possible as to what conclusion the medical referee had come to as to recovery. It is here that the inadequacy of the form shows itself. It was therefore remitted to the county court judge to ask the medical referee the following question :—

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(1) 22 B. W. C. C. 268.
(2) [1930] A. C. 516.
(3) [1929] A. C. 651.
(4) [1932] A. C. 1.

"Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it."

To that he gave the following answer :—

"The fact that Evan Edwards has had an attack of miners' nystagmus proves that he is a man who is predisposed to this disease, or is more susceptible to it, than his fellow-workers, who do not get it ; and when put under similar conditions again (i.e., at his work underground), he is likely sooner or later to develop a second attack.

A second attack is more easily induced (i.e., develops in quicker time) than the first attack, and so with subsequent attacks.

In this case there is also an added factor to induce nystagmus, viz., his very defective vision due to old inflammation of the eyes and incipient cataract.

My certificate means that he has now recovered from miners' nystagmus ; but he is likely to develop a second attack sooner or later if he goes underground ; and in much shorter time than it took to produce the first attack."

Before examining the cases which have been decided on the subject, it would be well to see exactly how the matter is dealt with in the statutes. It must be remembered that the old Workmen's Compensation Acts, 1897 and 1900, only dealt with accidents in the ordinary sense of the word. The application of the Act to industrial diseases made its appearance in 1906. That Act was a Consolidating Act and repealed the older Acts. What was declared to be an accident was not the industrial disease—i.e., a disease mentioned in the Schedule or which might be added to the Schedule by an order of the Secretary of State, but the disablement entailed by the disease. In that Act the provisions as to what might happen if the disablement owing to the accident was no longer present, or had become less in character, were to be found not in the body of the Act but in the Schedule. In the Schedule there is a provision that the workman should, at the request of the employer, submit himself from time to time for medical examination. The report is to be as to the workman's condition and fitness for employment. In the event of the workman not agreeing with the report, provision is made for the reference to the medical referee. The medical referee is to report as to the workman's condition and fitness for employment and also as to whether, or to what extent, the incapacity is due to the accident. On all these matters the decision of the medical referee is to be final. It will be noticed that here, so far, there is no provision allowing the employer to stop paying the compensation. That could be done by an application to the arbitrator to end the compensation (s. 16). There is no mention in the Schedule of the word "recover." In the Act of 1923, under the heading "Miscellaneous Amendments to the Principal Act," we get s. 14, which was copied verbatim and became s. 12 of the 1925 Act. Here it is that the word "recover" first appears. The Act of 1925 repealed the Act of 1906 and the Act of 1923, except some sections which are not in point.

The matter is now dealt with not in the Schedule but in the body of the Act and in several sections. There is s. 11, which provides for a review by the arbitrator upon which the payment may be ended. Sect. 18 provides that the workman must submit himself periodically for medical examination. Sect. 19 repeats totidem verbis what was in the Schedule of the Act of 1906, but then there is also s. 12, which provides another method of discontinuing the payment of the compensation. It is as follows :—

"An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases :

Viscount Dunedin.

(1.) where a workman in receipt of a weekly payment in respect of total incapacity has actually returned to work;

(2.) where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased;

(3.) where the medical practitioner who has examined the workman under section eighteen of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman:

Provided that—

(i) in the last-mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by the medical referee in pursuance of section nineteen of this Act; and

(ii) where an application has been made in pursuance of the said section nineteen to refer the dispute to a medical referee, it shall be lawful for the employer, pending the settlement of the dispute, to pay into court—

(*a*) where the notice was a notice to end the weekly payment, the whole of each weekly payment becoming payable in the meantime;

(*b*) where the notice was a notice to diminish the weekly payment, so much of each weekly payment so payable as is in dispute;

and the sums so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the registrar or, on appeal, the judge;

(iii) nothing in this section shall be construed as authorising an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so."

Here it is that the word "recovered" appears and it is on the reading of this section and its application to the certificate given that the present case depends.

I will now examine the cases. I may go at once to the case of *Evans* v. *Scahill* (1), because it was in your Lordships' House. In that case Scahill contracted nystagmus in 1923, and again in 1924, and he was paid compensation. In January, 1925, the employers applied for a reference to a medical referee. This was done under the provisions of the Schedule to the Act of 1906. In the order of reference the medical referee was asked specifically to report whether he, Scahill, has fully recovered from miners' nystagmus? The medical referee gave a certificate in which he said that the workman was "not suffering from miners' nystagmus but from hyperopia and that his incapacity is not due to the accident." In July, 1925, he was again, on his own initiative, examined by a certifying surgeon who certified that he was suffering from nystagmus. The employers asked for a remit to a medical referee, and it was referred to the same medical referee as had reported on the former time, and he confirmed the view of the certifying surgeon that the workman was suffering from nystagmus.

It was argued that the first certificate barred the way to all future proceedings in respect of the original attack. The House, confirming the judgment of the Court of Appeal, held that it did not. I quote the words of Lord Sumner who delivered the leading opinion: "My Lords, the provision

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(1) 20 B. W. C. C. 348.

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of the First Schedule of the Act of 1906, para. 15, which makes the certificate of a medical referee conclusive evidence, adds the words: 'as to the matters so certified.' I think that a provision which gives this effect to a certificate of a person who is not before the Court, and makes it conclusive against the evidence of competent witnesses who are, is, if any provision ever is, one which must be applied strictly, and must be limited to an exact compliance with its terms. Now, as the learned arbitrator justly pointed out, not only did the certificate not certify that the applicant had recovered from the original attack of the disease, but this question was submitted to him and left unanswered."

My Lords, I think this opinion makes it clear that a certificate may be such as to preclude further inquiry but that it must be strictly looked at to see whether it is so. But there is another observation which must needs be made on this case. Lord Sumner went on to say that this made it unnecessary to consider whether *Prendergast's* case (1) was rightly decided, but that that did not mean that he was casting doubts on it. It is, however, fair to say that Lord Atkinson said he thought it was rightly decided. The result of that is that *Prendergast's* case (1) is not made binding, though not discredited, by the judgment in *Scahill's* case. (2) *Prendergast's* case (1) does, I think, warrant the judgment now appealed against. Prendergast suffered from nystagmus and received compensation from 1917. The employers considered he had recovered in 1924, proceeding under s. 24 of the Act of 1923. A reference was made to a medical referee who gave a certificate to the effect that Prendergast "is not now suffering from miner's nystagmus, but from pains in his head and eyes due to astigmatism and neurasthenia . . . . and he is not fit for underground work." The employers stopped the compensation. The workman, three months afterwards, applied for arbitration. The parties agreed to ask for a reference to a medical referee. In this new reference, for it was to a different man from the first medical referee, it was certified that he was suffering from nystagmus and that the

(1) 18 B. W. C. C. 494.

(2) 20 B. W. C. C. 348.

nystagmus was a continuation of the old attack in 1917. The employer then pleaded that the original certificate ended the matter.

Now, it would have been possible to decide the case on the view that the parties, by agreeing to remit to a new medical referee, had really so to speak taken the case out of the statute, and Atkin L.J. was prepared to decide the case on that ground. But it was not so decided, and it was decided on the ground that the first certificate had only dealt with the present condition of the man and had not barred the way to a second certificate, which ascribed the existing nystagmus to a proneness to recur arising from the first attack. The curious part of the case is that there was no evidence as to proneness to recur. On the contrary, the second referee framed his second finding thus: "The present condition is a continuation of his attack of September, 1917, and so the question of increased susceptibility does not appear to me to arise in this case."

The view as to proneness to recur was therefore evolved from the fact that the referee said the present attack was a continuation of the old attack.

The case of *Starkey* (1) was relied on. That case, however, was much complicated by the particular conditions in which alone dermatitis becomes an industrial disease. It is, I think, worthy of notice that Warrington L.J. in the concluding sentence of his opinion certainly adumbrates the distinction between natural proneness to disease and proneness induced by an attack of disease, a matter which will be more fully dealt with hereafter. It is the failure to observe this distinction which to me vitiates the case of *Prendergast* (2) as a helpful authority, quite apart from the fact that it does not bind me though it did bind the Court of Appeal.

I now pass to the two cases which were, unfortunately, not mentioned to either of the Courts below. The first of these is *Wilsons and Clyde Coal Co.* v. *Burrows.* (3) In this case the workman, who had sustained an injury to his back, was paid compensation. Then the employers, conceiving that he had recovered, applied to end compensation. A remit was made to a medical referee, who reported: "He has, in my opinion, completely recovered from the accident and his condition is such that he is fit for his ordinary work." Upon that the employers applied to the arbitrator to end the compensation. The workman lodged a minute saying that there was a probability of a recurrence of inability and asked for proof of that with a view to obtaining a suspensory award. The Sheriff-Substitute, as arbitrator, ended the compensation. On appeal, the Second Division of the Court of Session (1) recalled the finding of the arbitrator and remitted to him to allow proof of the averments in the minute. The ground of judgment was clearly put by the Lord Justice-Clerk: "The certificate of the medical referee speaks only at its date, and affirms recovery as at that date. It has no concern with the future. It has no concern with the reasonable probability, therefore, of the recurrence of incapacity."

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(1) 18 B. W. C. C. 346. (2) 18 B. W. C. C. 494. (3) [1929] A. C. 651.

On appeal to this House that judgment was reversed. I quote a few sentences from my judgment: "It is quite clear that under the word 'condition' it would be a perfectly relevant inquiry, not only whether the man was fit for employment at the moment, which really comes under the succeeding words, but whether the injury was of such a character that there was, owing to the injury, some more or less latent disability at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening. That would be a perfectly relevant inquiry before the medical referee, and I have no doubt that if there is anything in the case of that sort it is the workman's duty to submit it to the medical referee, but when the medical referee has given his certificate that certificate is to be final. I search in vain for any idea in the statute that, notwithstanding the certificate of the medical referee, it is still within the power of the arbitrator or, if he does not do so, in the power of the Court on appeal, to order a general inquiry into the matter.

(1) 1929 S. C. 409, 416.

That idea, I think, would simply upset the whole scheme of the Act as to the medical referees. I have no doubt whatsoever that on the report of the medical referee it is perfectly competent for the arbitrator to say: 'Your report is ambiguous and I send it back to you in order that you may explain clearly what you mean'; but if the report is not ambiguous, then it is for the arbitrator to take that report and to take it as final. In the present case the report is not ambiguous. It says that he has completely recovered."

Lord Sumner is equally explicit. He says: "It seems to me not only that he (the medical referee) had the materials before him upon which he could express his opinion as to the reasonable probability of a recurrence of incapacity, but that his certificate would have spoken of any such reasonable probability, had it existed at its date, as well as of the past symptoms with which he had been familiar. With great respect to the decision of the Lord Justice-Clerk, his certificate had concern with the future and with the reasonable probability of an appearance of some further consequences of the accident, just as much as it had to do with the symptoms from which the man had been suffering, and I take it, therefore, that, having both these matters before him, his mind was directed to them and he expressed the conclusion in the statement that there was a complete recovery."

The second of these cases was the case of *Connor* v. *Cadzow Coal Co.* (1) That was a case of nystagmus. The case is very accurately stated in the headnote to the report, which is as follows: "A miner, who had been disabled by miners' nystagmus and was receiving compensation, was certified by the medical referee to have recovered and to be fit for his ordinary work. His employers lodged a minute craving the Sheriff-Substitute to end the compensation. In reply the workman lodged a minute in which he averred that he had not completely recovered from the disablement in respect that that attack of the disease left him less immune from a further attack, and that the risk of recurrence so engendered was wholly or mainly responsible for his

(1) [1932] A. C. 1.

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failure to obtain work, and asked to be allowed a proof of these averments.

The Sheriff-Substitute, founding on s. 9, sub-s. 4, refused to end compensation and allowed the workman a proof of his averments. The Second Division of the Court of Session, treating the certificate of the medical referee as a certificate of complete recovery, held that the compensation fell to be ended. The workman appealed, and after his case had been opened the House remitted the matter to the Court of Session to ascertain from the medical referee whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it. The medical referee having answered this question in the negative:—*Held*, that s. 9, sub-s. 4, of the Act applied to industrial diseases and that the appellant was entitled to have his averments admitted to probation."

Now, the ratio decidendi is stated by Lord Buckmaster as follows: "If a man has once been attacked, and has completely recovered, recurrence of the disease would be due to his original susceptibility, but if the recovery be not complete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away."

There is one other sentence in Lord Buckmaster's opinion which seems to me to go beyond what he has already laid down and also to go outside the question. It is this: "This answer . . . . leaves open the question whether after the ordinary symptoms have passed away and recovery appears to have taken place, it might not still be the fact that exposure to the same conditions would cause the illness immediately to recur. In these circumstances complete recovery cannot be asserted."

The question was as to susceptibility arising out of the disease, whereas exposure to the same conditions causing the disease to recur may be entirely owing to natural susceptibility.

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Lord Thankerton clearly puts the case on the distinction drawn in the first part of Lord Buckmaster's opinion. He says: "The averments which the appellant asked to be remitted to probation are not well drawn but, in my opinion, they sufficiently aver that the appellant has not completely recovered from the disablement of February 14, 1928, in respect that that attack of the disease had left him less immune from a further attack, and that the risk of recurrence so engendered is wholly or mainly responsible for his failure to obtain work. On the other hand, if the said attack now merely affords evidence of constitutional susceptibility to the disease, any recurrence would be due to the latter and not to the attack of February, 1928, and would constitute a fresh disablement."

It ought to be said that the present case is in a somewhat different position from *Connor's* case.(1) *Connor's* case was based on the averment that the case fell within s. 9, sub-s. 4. Whether it did or not would depend on what came to be proved. The present case is a case where the man is being employed, but at a lower wage than what he could get for underground work, and the question is, whether he is entitled to compensation payment on the ground of partial disablement. Nevertheless, undoubtedly the question as to the finality of the report of a medical referee is fairly raised in both cases.

Now, the outcome of all this seems to me to be simply whether the medical referee's report amounts to complete recovery or not. In *Connor's* case (1), the answer to the question put being a simple negative, it was held that the report did not amount to complete recovery, but the answer in this case is much more explicit and the point is, is it a certificate of complete recovery or not? Undoubtedly, it is a difficult and narrow question and opinions on it might well differ. I keep steadily in view the real question and it is this: Assuming that the man is suffering from nystagmus on March 27, 1930, is it competent, in face of the report of the medical referee, to say that the attack is due to the original attack of October 17, 1920, or is it a fresh attack? I take the report paragraph by paragraph.

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(1) [1932] A. C. 1.

The first paragraph asserts the predisposition of the subject to the disease and the consequent probability of a second attack when subjected to the same condition as brought on the first attack. That is constitutional susceptibility and nothing else and is compatible with complete recovery.

The next paragraph says a second attack is more easily induced, i.e., develops in quicker time, than the first attack, and so with subsequent attacks; and, along with this, the last paragraph: "My certificate means that he has now recovered from miners' nystagmus, but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

I am of opinion that the mere fact that a second attack will develop quicker than a first is a natural concomitant to susceptibility and is compatible with complete recovery from the original disablement having taken place. After all why cannot the man go back to underground work? It is not because he has had nystagmus, but because he is constitutionally susceptible to nystagmus. That has been certiorated by the fact of the old attack. It is quite in consonance with the scheme of making disability arising from an industrial disease equivalent to an accident, that the employer should pay compensation while the disability lasts. But that disability has gone, and a disability which ensues because he is subjected to the same conditions is a new disability due to an old constitutional susceptibility. If this is not so, then complete recovery from nystagmus is an impossibility. That seems to be a result which is opposed to the scheme of the Act, which looks upon the ending of the disability as a possible occurrence. I therefore come to the conclusion that the certificate here was one of complete recovery, and that being so it cannot be contradicted by a finding by some one else which is incompatible with complete recovery.

I therefore move your Lordships to reverse the decision of the Court of Appeal and restore the award of the arbitrator, the respondent to pay the costs here and below.

LORD WARRINGTON OF CLYFFE. My Lords, the workman in this case (the respondent) for several years prior to and in 1920 was employed by the appellants as a miner. On October 17, 1920, he was certified by the certifying surgeon to be incapacitated by miners' nystagmus. The date of disablement was the date of the certificate—namely, October 17, 1920.

The respondent received compensation as for total incapacity until January, 1924, after which date he received 18*s*. 6*d*. a week on the footing of partial incapacity until it was stopped on January 24, 1930.

On January 14, 1930, the appellants pursuant to s. 12, sub-s. 3, of the Act served upon the respondent a ten days' notice to terminate compensation accompanied by a medical certificate to the effect that he had wholly recovered from any incapacity due to miners' nystagmus. On January 24, 1930, payment of compensation was stopped.

A counter certificate having been filed by the respondent the matter was, pursuant to s. 19, sub-s. 2, referred to Dr. F. P. S. Cresswell, a duly appointed medical referee, who after examination of the respondent gave a certificate dated February 15, 1930, pursuant to s. 19, sub-s. 3.

This certificate was in the following terms:—

"1. The said Evan Edwards is not now suffering from miners' nystagmus but from defective vision due to cataract and old inflammation of the eyes, and his condition is such that his sight is not good enough for underground work but only for work on the surface.

2. The incapacity of the said Evan Edwards is not due to miners' nystagmus but to other defects mentioned above."

Thereupon the appellants refused to pay further compensation.

The respondent then obtained another certificate from the certifying surgeon to the effect that he was on March 27, 1930, suffering from miners' nystagmus and was thereby disabled from earning full wages at the work at which he had been employed and that the disablement commenced on October 17, 1930.

This certificate seems to me to be directly contrary to that of the medical referee, which under the statute is final and conclusive. The difference in dates is really immaterial, because there is no suggestion that there was any alteration in the man's condition physically or otherwise between February 15, 1930, the date of the medical referee's certificate, and March 27, that of the certificate of the certifying surgeon. The difference between them seems to me to be purely one of diagnosis, and in that case the certificate of the medical referee must prevail.

The respondent, however, commenced the present proceedings, claiming compensation at the rate of 18*s.* 6*d.* per week from January 24, 1930, on the footing of partial incapacity.

The appellants denied liability, relying on the certificate of the medical referee as final and conclusive.

The respondent before the arbitrator admitted that his condition was then (July 7, 1930) the same as it had been when he was examined by the medical referee.

The arbitrator made an award in favour of the appellants, but this was on April 28, 1931, set aside by the Court of Appeal (Lord Hanworth M.R. and Lawrence and Slesser L.JJ.). Hence the present appeal.

The appeal came before this House on March 18, 1932, when your Lordships determined to refer the matter to the arbitrator for the purpose of obtaining from the medical referee an answer to the following question—namely, "Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it."

The answer of the medical referee was as follows :—

"The fact that Evan Edwards has had an attack of miners' nystagmus proves that he is a man who is predisposed to this disease, or is more susceptible to it, than his fellow workers, who do not get it ; and when put under similar conditions again (i.e., at his work underground) he is likely sooner or later to develop a second attack.

A second attack is more easily induced (i.e., develops in quicker time) than the first attack and so with subsequent attacks.

In this case there is also an added factor to induce nystagmus, viz., his defective vision due to old inflammation of the eyes and incipient cataract.

My certificate means that he has now recovered from miners' nystagmus; but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

I have carefully considered the certificate and the supplementary statement supplied at your Lordships' request in the light of the material provisions of the statute, and have arrived at the conclusion that the appeal ought to be allowed and the award in favour of the appellants restored.

There are two conditions specified in s. 43 as essential to a right to compensation (1.) that the workman is suffering from the disease, and (2.) that he is *thereby disabled* from earning full wages at the work at which he was employed; and it is the disablement which is to be treated as the happening of the accident.

The original certificate of the medical referee stated that the appellant "is not now suffering from miners' nystagmus" but from the other defects of vision therein mentioned; and further that his incapacity "is not due to miners' nystagmus" but to the other defects mentioned. I think on consideration I should have been prepared to say that the certificate by itself directly negatived the existence of one of the conditions mentioned above—namely, that he was *by the disease* disabled from earning full wages, and that treating it as final and conclusive as to the matters certified, the Court of Appeal ought to have given effect to it, and to have affirmed the award of the arbitrator. But I am glad that the further statement was obtained, for I think this removes any doubt I may have felt. It is in my judgment clear that in the view of the referee the original attack was due to the man's constitutional predisposition to the disease and his greater susceptibility to it than his fellow workers. He further finds that he has now

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recovered from the disease. He would be likely sooner or later to develop a second attack, obviously, as I understand, by reason of the constitutional predisposition above referred to, helped by the defective vision arising from other causes than nystagmus. It is important to notice that the referee is careful always to refer to a second attack, not to a recrudescence of the first. I cannot find in either the certificate or in the further statement any trace of the idea that the first attack is so to speak only suspended, or that the second attack could be treated as a continuance of the first. The fact that the second attack is "more easily induced, viz., develops in quicker time than the first attack," is not in my judgment inconsistent with the view I have above expressed. The attack would still be a second attack, and disablement if it occurred would be caused thereby and not by the first.

So far I have not discussed the authorities, for the reason that I prefer to consider first the construction and effect of the statute in reference to the circumstances of the particular case, and then to examine whether the view so arrived at is supported by or is inconsistent with authority by which I am bound.

The latest and perhaps the most important case, because the ultimate decision of this House was in favour of the workman, is *Connor* v. *Cadzow Coal Co.* (1)

In that case the question turned on the effect of a medical referee's certificate that the man had "recovered" from the attack. This certificate left it in doubt whether he had completely recovered or was after and in consequence of the attack more susceptible to the disease than he had been before it. In answer to an inquiry directed by this House as to the intention of the referee he replied that he had not intended to certify that the man had completely recovered in the sense above mentioned. It was because so explained the certificate was not one of complete recovery that this House decided in favour of the workman. See particularly the opinion of Lord Buckmaster. (2) He says: "If a

(1) [1932] A. C. 1.

(2) [1932] A. C. 5.

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man has once been attacked and has completely recovered, recurrence of the disease would be due to his original susceptibility, but if the recovery be not complete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away." It was because he regarded the certificate as not one of complete recovery, but left open the question whether after the ordinary symptoms have passed away, and recovery appears to have taken place, it might not still be the fact that exposure to the same conditions would cause the illness immediately to recur, that he concurred in the decision of the House. In the present case that question is in my opinion not left open. The recurrence would be due to constitutional susceptibility and not to the previous attack.

In Lord Thankerton's opinion there is a passage on p. 11 which indicates that in his view such a case as the present would be treated as one of complete recovery. He says: "If the said attack now merely affords evidence of a constitutional susceptibility to the disease, any recurrence would be due to the latter and not to the attack of February, 1928, and would constitute a fresh disablement."

This case, therefore, is not an authority inconsistent with the views I have expressed above, but I think tends to support it.

In *M'Dougall's* case (1) the man had been certified to have completely recovered from a first attack. He was again attacked and obtained a fresh certificate of disablement, and it was decided by this House that this fresh disablement was a fresh injury by accident. This case so far as it goes supports the view I have expressed.

I have referred to the other cases cited and do not find in them anything contrary to the view I have expressed on the circumstances of this case.

In my opinion the appeal succeeds, and the award of the arbitrator should be restored with costs here and in the Court of Appeal.

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(1) 20 B. W. C. C. 419.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion which has been delivered by my noble and learned friend on the Woolsack, and I desire to say that I entirely concur in it. I would only add my hope also that, in view of the criticisms which have been made upon the official forms by the noble and learned Viscount, the Secretary of State will reconsider the present forms.

VISCOUNT DUNEDIN. My Lords, I am requested to say that my noble and learned friends, Lord Atkin and Lord Macmillan, concur in the opinion which I have delivered.

Order of the Court of Appeal reversed and award of the arbitrator restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the County Court of Glamorganshire to do therein as shall be just and consistent with this judgment.

Lords' Journals, June 28, 1932.

Solicitors for the appellants: *Bell, Brodrick & Gray, for Kensholes, Prosser & Co., Cardiff.*

Solicitors for the respondent: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Considered. FUNG KAI SUN *v.* CHAN FUI HING [1951] A. C. 489

[HOUSE OF LORDS.]

GREENWOOD (PAUPER) . . . . . . APPELLANT ;

AND

MARTINS BANK, LIMITED . . . . RESPONDENTS.

H. L. (E.)*
1932
July 5.

Banker—Forged Cheque—Payment by Banker—Action to recover Money paid—Customer's Knowledge of Forgery—Non-disclosure—Husband and Wife—Loss of Remedy against Forger—Estoppel.

A husband and wife had a joint account with bankers who undertook to honour cheques signed by both customers. Afterwards, that account was closed and an account was opened in the sole name of the husband, the wife having no authority to draw cheques upon it. During the currency of both accounts the wife repeatedly forged her husband's signature to cheques, and drew out money which she applied to her own uses. During the currency of the sole account the husband became aware of the forgeries, but, being persuaded by his wife to say nothing about them, he kept silence for eight months. When he finally determined to disclose the forgeries to the bank, the wife committed suicide. In an action by the husband against the bankers to recover the sums paid out of the sole account on cheques to which his signature had been forged as aforesaid :—

Held, that the plaintiff owed a duty to the defendants to disclose the forgeries when he became aware of them and so enable the defendants to take steps towards recovering the money wrongfully paid on the forged cheques ; that through his failure to fulfil this duty they were prevented from bringing an action against the plaintiff and his wife for the tort committed by the wife until after her death, when any action against the husband for the wife's tort abated ; and therefore that the plaintiff was estopped from asserting that the signatures to the cheques were forgeries, and was not entitled to recover.

McNeall v. *Hawes* [1923] 2 K. B. 538 observed upon.

Decision of the Court of Appeal [1932] 1 K. B. 371 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Mr. Commissioner du Parcq K.C. (now du Parcq J.) at the Manchester Assizes in an action in which the appellant was plaintiff and the respondents were defendants.

The action was brought by the appellant for a declaration that he was entitled to be credited by the respondent bank

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* *Present :* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

(1) [1932] 1 K. B. 371.

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in their books with the sum of 410*l.* 6*s.*, being the aggregate amount of a number of cheques which the appellant's wife had drawn on the appellant's account with the bank and in which she had forged the appellant's name as drawer of the cheques. All these cheques had been honoured by the bank.

The Commissioner gave judgment for the appellant, but his judgment was reversed by the Court of Appeal (Scrutton, Greer and Romer L.JJ.) on the ground that the appellant, by deliberately refraining from informing the bank of the forgeries for eight months after he became aware of the fact, and until after his wife's death, thereby depriving the bank of their remedies against the wife and the appellant, was estopped from asserting that the signatures were forgeries.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Lord Tomlin.

1932. June 2, 3, 6. *Cyril Atkinson K.C.* (with him *J. Catterall Jolly* and *R. A. Eastwood*) for the appellant. 1. The appellant had a right of action against the respondent bank for parting with money without his authority. The failure on the part of the respondent bank to sue the forger was not due to the appellant's breach of duty, but to a belief already existing caused by their own negligence.

2. The appellant's silence does not constitute an estoppel precluding him from asserting that the cheques were forged, inasmuch as all the material facts were not known to him, whereas the respondents knew or had the means of knowing all the said facts. In *M'Kenzie* v. *British Linen Co.* (1) Lord Watson did not intend to depart from the principle of estoppel laid down by Parke B. in the well known case of *Freeman* v. *Cooke.* (2)

[On this point he also referred to *Davis* v. *Bank of England* (3); *Ogilvie* v. *West Australian Mortgage and Agency Corporation* (4); *Ewing* (*William*) *& Co.* v. *Dominion Bank.* (5)]

3. Estoppel cannot be relied on by the respondents, because there was no representation by the appellant which induced

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(1) (1881) 6 App. Cas. 82, 109.
(2) (1848) 2 Ex. 654, 663.
(3) (1824) 2 Bing. 393, 408.
(4) [1896] A. C. 257, 268.
(5) [1904] A. C. 806.

the respondents to alter their attitude, but it was their own negligence in not examining the signatures which was the real and proximate cause of their ignorance of the forgeries or at any rate had contributed to that ignorance. The law is so stated in Paget's Law of Banking, 4th ed., pp. 330, 345, and *Critten* v. *Chemical National Bank* (1) is cited, but it is admitted that until the present case the effect of the bank's negligence has never been debated or decided in this country. The respondents are attempting to set up the negligence of the appellant to get rid of the ignorance caused by their own negligence.

4. The respondents have lost no right of action. There never was any right in the respondents to sue the wife along with the appellant, her husband, in an action of tort, inasmuch as the wife must be taken to have warranted the genuineness of the cheques by presenting them for payment: *McNeall* v. *Hawes* (2), and the tort was connected with a contract within the meaning of the authorities: *Liverpool Adelphi Loan Association* v. *Fairhurst* (3); *Wright* v. *Leonard* (4); *Collard* v. *Wright* (5); *Starkey* v. *Bank of England* (6); Chalmers on Bills of Exchange, 9th ed., p. 230; *Edwards* v. *Porter*. (7)

5. The loss of the respondents' right of action (if any) was not a natural or probable consequence of the appellant's breach of duty in not informing the respondents of the forgeries: Byles on Bills, 19th ed. (1931), p. 293.

Eastham K.C. (with him *B. R. Rice-Jones*) for the respondents. The appellant failed in his duty to the respondents in keeping silent when he knew or ought to have known that they were relying on the validity of the forged cheques, and for eight months he permitted the respondents to debit his account with the forged cheques and lose their remedies against the appellant's wife and himself. In these circumstances, on the principle of *M'Kenzie* v. *British Linen Co.* (8), he is estopped from alleging that the signatures were forgeries. This really

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(1) (1902) 171 N. Y. Rep. 219.
(2) [1923] 2 K. B. 538.
(3) (1854) 9 Ex. 422.
(4) (1861) 11 C. B. (N. S.) 258.
(5) (1857) 8 E. & B. 647.
(6) [1903] A. C. 114, 116, 117.
(7) [1925] A. C. 1.
(8) 6 App. Cas. 82, 109.

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follows from *Freeman* v. *Cooke* (1) itself, for Parke B. says: "Conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." There is here a representation by conduct by which the respondents have suffered, and it was wilfully made in order to protect the wife. All the ingredients are present which are necessary to give rise to an estoppel. The respondents' negligence did not deprive them of the right to complain of the appellant's negligence, which resulted in their remedies being lost. The passage in Paget's Law of Banking is not supported by the authority there cited. It is not true to say that there was any contract between the respondents and the appellant's wife. By s. 24 of the Bills of Exchange Act a forged bill is void for all purposes, and there could be no contractual relationship between the bank and the forger: see *Brook* v. *Hook.* (2) When the substance of the matter is looked at this is a case of tort and not of implied breach of contract. *McNeall* v. *Hawes* (3) was wrongly decided.

[He also referred to *Earle* v. *Kingscote* (4); *Guaranty Trust Co. of New York* v. *Hannay & Co.* (5); and *Edwards* v. *Porter.* (6)]

Cyril Atkinson K.C. in reply referred to *Carr* v. *London and North Western Ry. Co.* (7)

The House took time for consideration.

1932. July 5. LORD TOMLIN. My Lords, on March 6, 1926, the appellant, who was carrying on a dairyman's business at Blackpool, opened with the respondents at their branch in Clifton Street, Blackpool, a joint account in the name of himself and his wife. It was arranged with the respondents that cheques on this account should bear the signatures both of the appellant and of his wife.

On November 8, 1928, the appellant opened a further banking account in his own name at the same branch of the respondents' bank. Cheques upon this account were to bear the signature of the appellant alone.

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(1) 2 Ex. 654, 663.
(2) (1871) L. R. 6 Ex. 89, 100.
(3) [1923] 2 K. B. 538.
(4) [1900] 2 Ch. 585, 593.
(5) [1918] 2 K. B. 623, 631–2.
(6) [1925] A. C. 1, 20.
(7) (1875) L. R. 10 C. P. 307, 318.

The pass-books and cheque-books in respect of these accounts were kept by the appellant's wife, who gave her husband a cheque from the cheque-book when he asked for it.

In October, 1929, the appellant asked his wife to bring him a cheque, saying that he wanted to draw 20*l.* from his separate account with the respondents, whereupon the appellant's wife informed the appellant that there was no money in the bank and told him that she had used the money to help her sister in legal proceedings relating to a house and had drawn it out. The appellant thereupon asked her who had forged his name and she would not tell him She begged the appellant not to inform the respondents of the forgeries until her sister's case was over. In the hope of a favourable result to the sister's action and for his wife's sake the appellant said nothing to the respondents.

On June 5, 1930, the appellant discovered that there were no legal proceedings instituted by his wife's sister and that his wife had deceived him. Thereupon the appellant informed his wife that he would go at once to the respondents. He returned to the house that evening without having gone to the bank. On his return his wife shot herself.

After his wife's death the appellant ascertained that he had been debited by the respondents in his separate account with the sum of 410*l.* 6*s.* in respect of forged cheques.

At this time the appellant was not aware that anything irregular had occurred in connection with the joint account of himself and his wife.

On August 19, 1930, the appellant began an action against the respondents in the King's Bench Division, Preston District, for a declaration that he was entitled to be credited by the respondents with the sum of 410*l.* 6*s.* with which he alleged they had wrongfully debited him.

In their defence the respondents denied the forgeries and alternatively pleaded that they were caused to pay the money by reason of the appellant's own negligence and, further, that he was estopped from saying that the respondents paid the money wrongfully or without his authority or that the signatures on the cheques were placed there without his authority. At the trial ratification, adoption and estoppel were all relied upon by the respondents.

The action was tried at the Manchester Assizes on May 12, 1931, before Mr. Commissioner du Parcq K.C. (now du Parcq J.), and in the course of the trial the following facts with regard to the separate account were admitted or proved, namely :—

(1.) Between November 14, 1928, and October 20, 1929, the appellant's wife, Emma Greenwood, drew forty-four "order" cheques upon the appellant's separate banking account and forged the name of the appellant as drawer of the said cheques. The value in the aggregate of such cheques was the sum of 410*l.* 6*s.* Forty-two of such cheques were expressed to be in favour of a non-existent person, Emily Greenwood, and in the remaining two of them, dated respectively January 14, 1929, and May 16, 1929, the name of the payee inserted was "Emma Greenwood." The cheques purported to be endorsed by the drawees, but by whom the endorsements were made was not proved.

(2.) The forged cheques were presented for payment, and through the negligence of the respondents' officials in failing to detect that the signatures thereon were not genuine, were honoured and paid. The respondents debited the appellant's account with sums amounting in all to 410*l.* 6*s.* in respect of such cheques.

(3.) Some of the cheques were presented for payment by the appellant's wife in person and others by some other woman who was not definitely identified. It did not appear how many or which of the cheques were presented by the appellant's wife.

(4.) The appellant did not give the respondents any information in regard to the matter until after his wife's death, and until after her death the respondents remained in ignorance of the forgeries. It further appeared in the course of the proceedings and the appellant then for the first time became aware that there had been grave irregularities in connection with the joint account and that his wife had drawn upon that account by eleven cheques to which she had forged his name, and that she had closed the account by drawing out the balance with a cheque signed by herself alone and, notwithstanding the absence of the appellant's signature, honoured by the respondents.

The Commissioner held that the appellant was entitled to succeed, taking the view that the respondents' negligence was the proximate cause of their loss and that, therefore, they could not set up an estoppel against the appellant.

The Court of Appeal were unanimous in reversing the learned Commissioner's decision. Scrutton L.J. held that there was a duty on the appellant to disclose the forgeries and that in the circumstances the failure to disclose gave rise to an estoppel, because the failure to disclose deprived the respondents of their opportunity to proceed against the forger. The reasoning of the other Lords Justices was on the same lines.

Now it may be said at once that there can be no question of ratification or of adoption in this case. The necessary elements for ratification were not present, and adoption as understood in English law requires valuable consideration, which is not even suggested here.

The sole question is whether in the circumstances of this case the respondents are entitled to set up an estoppel.

The essential factors giving rise to an estoppel are I think :—

(1.) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

(2.) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.

(3.) Detriment to such person as a consequence of the act or omission.

Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.

The existence of a duty on the part of the customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question in this case was rightly admitted.

The respondents' case is that the duty ought to have been discharged by the appellant immediately upon his discovery in October, 1929, and that if it had been then discharged they could have sued the appellant's wife in tort and the appellant himself would have been responsible for his wife's tort. They claim that his silence until after his wife's death amounted in these circumstances to a representation that the cheques were not forgeries and deprived the respondents of their remedy.

The appellant, on his part, says: (1.) that there was no representation express or implied; (2.) that the respondents' omission to sue and any resulting loss was the consequence of their own initial negligence and was not due at any rate exclusively to the appellant's omission; and (3.) that there was in fact no loss or detriment, because the only remedy of the respondents against the appellant's wife would have been in contract and not in tort, and because such a remedy would have been fruitless against the wife and the appellant would not have been responsible.

Now the evidence of the respondents' cashier, which was accepted by the learned Commissioner, was that the appellant after his wife's death said to the respondents' officials "that he had known about it since last October, that he did not wish to cause any bother and he did not want to give his wife away."

The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced—namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel. Further, I do not think that it is any answer to say that if the respondents had not been negligent initially the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarily induced by the respondents' own negligence? In my judgment it can make none. For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration.

The question remains whether the respondents in fact suffered loss or detriment.

Now, notwithstanding the Married Women's Property Act, 1882, a husband is still liable for the torts of his wife committed during coverture, unless the tort is directly connected with a contract with her and is "the means of effecting it and parcel of the transaction": see *Liverpool Adelphi Loan Association* v. *Fairhurst* (1); *Earle* v. *Kingscote* (2); and *Edwards* v. *Porter*. (3) If, therefore, for example, the tort consists in a fraudulent misrepresentation by the wife inducing a third party to contract with her the husband is not liable: see *Liverpool Adelphi Loan Association* v. *Fairhurst*. (1)

Here there is no contract between the respondents and the wife, unless such a contract can be implied from the circumstances in which the cheques were presented and honoured.

It is urged on behalf of the appellant that the wife must be treated as having warranted to the respondents the genuineness of the cheques in consideration of their cashing them. There are, it seems to me, two answers to this argument—namely, first, that it has not been proved in regard to any particular cheque that it was, in fact, presented for payment by the wife; and, secondly, that the holder of a bill of

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(1) 9 Ex. 422.
(2) [1900] 2 Ch. 585.
(3) [1925] A. C. 1.

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exchange does not by presenting it for payment warrant its genuineness (see *East India Co.* v. *Tritton* (1) and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2)), and that there is nothing in the circumstances of the present case from which a special warranty can be implied. In this connection I desire to say that I am not prepared without further consideration to accept as well decided the case of *McNeall* v. *Hawes* (3), to which reference was made in the course of the argument.

It follows from what I have said that in my opinion this appeal fails and ought to be dismissed.

My Lords, I am authorized by my noble and learned friends, Lord Atkin and Lord Warrington of Clyffe, to say that they concur in the opinion which I have read.

LORD THANKERTON. My Lords, I also concur.

LORD MACMILLAN. My Lords, I also concur.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, July 5, 1932.

Solicitors for the appellant: *Indermaur & Brown, for Woosnam & Co., Blackpool.*

Solicitors for the respondents: *Haslewood, Hare & Co., for A. Kidd Whitaker & Son, Blackpool.*

(1) (1824) 3 B. & C. 280, 289, 291.
(2) [1918] 2 K. B. 623, 631, 632.
(3) [1923] 2 K. B. 538.

[PRIVY COUNCIL.]

PRONEK . . . . APPELLANT;

AND

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY . } RESPONDENTS.

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Oct. 13.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Manitoba)—Railway—Negligence—Railway on Highway—Statutory Rights—Preferential but not exclusive Rights—Duty to Public—Warning Light—Verdict of Jury—Explanatory Answer.

Where a railway company runs its cars along part of a highway, its statutory right not being exclusive of the right of the public though preferential in the sense that upon the approach of a car other users of the highway have to give it right of way, the company is under a legal duty by its servants to be on the watch for the safety of persons on the railway track, and to equip its car with lights adequate at night to enable the driver to stop in time to avoid them. It is not sufficient to equip the car with a light of a recognized and proper pattern, reasonable care must be taken that a car does not proceed when the light is out of order. There is a reciprocal duty upon persons using the highway to take reasonable care to avoid the car.

The language used by a jury in explaining their reasons for their verdict should not be construed too narrowly.

Rex v. *Broad* [1915] A. C. 1110 followed.

Judgment of the Supreme Court of Canada [1929] S. C. R. 314 reversed.

APPEAL (No. 27 of 1931) by special leave from a judgment of the Supreme Court of Canada (February 3, 1929) reversing a judgment of the Court of Appeal of Manitoba, which affirmed a judgment of the Court of King's Bench for that Province.

The appeal arose out of an action brought by the appellant against the respondents claiming damages for negligence. The trial judge (Curran J.), upon answers returned by the jury, entered judgment for the plaintiff for the damages claimed, and that judgment was affirmed by the Court of Appeal.

Upon an appeal to the Supreme Court of Canada, reported at [1929] S. C. R. 314, a majority of that Court (Newcombe,

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

Rinfret and Smith JJ.; Anglin C.J. and Lamont J. dissenting) reversed the decision of the Court of Appeal and dismissed the action.

The appeal raised questions as to the respondents' duty towards persons using part of a highway upon which the respondents had under statute a preferential, though not an exclusive, right.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

1932. July 18, 19, 21. *Bensley Wells* and *P. M. Wright* for the appellant.

Tilley K.C. for the respondents.

In addition to cases mentioned in the judgment reference was made to *Vancouver Ice and Cold Storage Co.* v. *British Columbia Electric Ry. Co.* (1); *Allen* v. *Esquimalt and Nanaimo Ry. Co.* (2); and *Grand Trunk Ry. Co.* v. *McKay.* (3)

Oct. 13. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant in this case was plaintiff in the action. He is a farmer living at Rossdale, about fifteen miles north of the City of Winnipeg, in the Province of Manitoba, and his claim is that he suffered damage by the respondents' negligence and breach of duty. The respondents are a company incorporated by special Act of the legislature of Manitoba (Statutes of Manitoba, 1900, c. 78, as amended by Statutes of Manitoba, 1904, c. 90) and as affected by Manitoba Railway Act, 1913, c. 168. The respondents' line ran from Winnipeg northwards to Selkirk, about nineteen miles in distance, and was laid on the west side of the highway between these points and actually along the highway, but in a distinct portion, separated by a wide ditch from the gravelled roadway ordinarily used by vehicles and foot passengers: the ditch and railway were traversed at intervals by crossings from the roadway to the places to the west. Power so to lay the track along the highway

(1) (1927) 38 B. C. Rep. 234.

(2) (1920) 1921, 1 W. W. Rep. 750.

(3) (1903) 34 Can. S. C. R. 81, 97.

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was given by the Act of 1900, and in particular s. 13 of that Act provided (though in fact this provision was not observed in the locus in quo) that as far as practicable the railway should be laid as nearly flush as possible with the street or highway along which it is laid so as to offer the least possible impediment to the ordinary traffic of the streets and highways consistent with the proper working of the railway. Sect. 24 provided for the making of agreements by the respondents with the rural municipalities through which the railway passed. Such agreements were scheduled to and confirmed by the Act of 1904. These agreements, which, while varying in details, granted to the respondents on certain conditions the privilege or franchise of laying their lines and erecting poles, etc., along and on the highway, expressly provided (inter alia) that all cars and trains should have the right of way on the tracks and highways, and any vehicles, horsemen or foot passengers should, on the approach of any car, give the car right of way. The agreements also contained a term that all cars running after dark should be provided with signal lights to be conspicuously displayed thereon. With these agreements there is to be considered s. 38 of the Railway Act, which provides that no person other than those connected with, or employed by, the railway company shall walk along the track except where the same is laid across or along a highway, and not even then if the track be laid on a separate and distinct part of such highway, and it be so expressed or understood between the company and the municipal council in whose territory such highway is comprised. So far from there being in the present case any such matter expressed or understood (whatever may be the meaning of that latter term), the language of the agreements just quoted shows that the respondents were to have no exclusive user of their track along the highway, but were merely to have a preferential right of way on the approach of a car. Sect. 40 of the same Act provides that every railway company shall at all times provide adequate equipment and motive power for the efficient working of the railway, subject to the directions of the Public Utility

Commissioner, whose functions do not appear to have been invoked in regard to this railway, so that they are irrelevant in this dispute.

The appellant sustained the injuries complained of while returning home from Winnipeg along the Selkirk Road on a sleigh drawn by a pair of horses: the casualty occurred about 7 P.M., about twelve miles north of Winnipeg. The horses, while proceeding along the gravelled roadway, took fright at the flapping canvas of a passing truck, swerved to the left across the respondents' track by way of a crossing, and galloped on to the field beyond. The appellant pulled them with his right rein, the left rein having slipped from his hand, back on to the crossing, but they were still out of control and went at full gallop down the rail track for about half a mile, when the outfit was run into from behind by the respondents' electric car; sleigh, horses and appellant were carried along for about 280 feet before the car, which had been travelling at about thirty miles an hour, stopped. One horse was killed, another badly hurt, the sleigh was damaged, and the appellant was rendered unconscious and seriously injured. According to the evidence of McLeod, the motorman who was driving the car from Selkirk to Winnipeg, the single headlight which the car carried was not on that trip functioning properly and threw a light so dim that he could not distinguish the appellant's outfit till within 60 feet: the car could not at the speed it was going be stopped in less than 420 feet. If the headlight had been in order it would have thrown a light for 500 or 700 feet or substantially more. According to the same witness, the respondents kept at Selkirk a superintendent or barn foreman, who attended to matters of equipment of cars, including headlights, but he went off duty at 6 P.M.; the light had been giving trouble on the way up from Winnipeg, and on arrival at Selkirk about 6.20 P.M. McLeod tried to put it right by changing the carbon, but there was no one to help him save a night watchman, who had no expert knowledge or skill. He accordingly started on the return journey in order to keep schedule time, but the light was so bad that he stopped twice

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before the accident to examine it. The respondents' evidence was that the light was not only of standard make, used in 90 per cent. of the cars in North America, but had been tested shortly before and after the accident and found in order.

The appellant, having commenced an action, alleged in his particulars of negligence that the respondents were negligent in the following respects: (*a*) In proceeding at a reckless and dangerous rate of speed, and in failing to maintain a careful and proper lookout on the car. (*b*) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop. (*c*) In not keeping the car properly equipped with sufficient and adequate brakes, and in failing to apply the brakes and slow down the car in time to avoid a collision.

The case was tried before Curran J., who, notwithstanding the insistence of counsel for the appellant, refused to submit to the jury any question whether the accident was due to the excessive speed, having regard to the defects in the headlight, at which the car was driven.

The learned judge submitted questions and received answers from the jury as follows:—

" Q. No. 1. Were the defendants guilty of negligence ?—A. Yes.

Q. No. 2. If so, in what did this negligence consist ?—A. Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

Q. No. 3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence ?—A. Yes.

Q. No. 4. Was the plaintiff guilty of contributory negligence ?—A. No.

Q. No. 5. If so, in what does such negligence consist ?—A. None.

Q. No. 6. Might the defendants' servants after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident ?—A. No, none from evidence submitted. The motorman did all in his power to avoid the accident.

Q. No. 7. At what sum do you assess the plaintiff's damages? —A. Special $354.25. General damages $2000.00."

The answer to question 2, not being a finding of any of the acts of negligence alleged, the jury, after being asked to reconsider their answer to that question, returned the following amended answer: "Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident."

On these findings the learned judge on May 27, 1927, entered judgment for the appellant for $2354.25 and costs. The respondents appealed to the Court of Appeal for Manitoba, who dismissed the appeal. The respondents then appealed to the Supreme Court of Canada, who on February 5, 1929, allowed the appeal by a majority (consisting of Rinfret, Newcombe and Smith JJ.; Anglin C.J. and Lamont J. dissenting) and ordered judgment to be entered for the respondents and refused a new trial to the appellant. From that judgment this appeal to His Majesty in Council is brought by special leave.

Their Lordships are of opinion that on any view the Supreme Court ought to have ordered a new trial, so as to put to the jury the question whether the accident was not due to the negligence of the respondents by their motorman in driving at an excessive speed having regard to his knowledge that the headlight was inadequate—that is, at an excessive speed in view of all the circumstances; but this need not be further considered, for reasons which will appear hereinafter.

It is in the discretion of a trial judge to ask a jury to give a general verdict, or require them to answer specific questions. But the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly. Their final answer to question 2 may fairly be taken to mean that, according to their finding, the headlight on the journey in question was not functioning properly, and there was negligence on the part of respondents or their servants in proceeding or allowing the car to proceed with a headlight so dim that if there was an object on the track the driver could not see it in time to avoid it. They must also have thought that there ought to have been at Selkirk expert men available who could deal with emergency repairs, not only up to 6 P.M., but as long as the cars were running. If that latter element be excluded as not sufficiently pleaded, the other finding is not open to that objection.

It is convenient first to determine the legal position of the appellant when on the track at the time he was struck. The statutes referred to above gave the respondents the right to lay and operate the track—that is, to do something which, apart from the statutes, would have constituted a nuisance, because the track was laid on what was and remained part of the highway. Members of the public still continued entitled to use that part of the highway, though the respondents had a preferential right in the sense that, on the approach of a car, other users of the highway were to give the car "right of way." But that did not involve that the cars were to be driven in disregard of other users of that part of the highway: no doubt members of the travelling public would prefer to use the ordinary gravelled part of the highway; apart, however, from the special circumstances which placed the appellant, against his will, on the track, the same position might arise in other ways: a horse and buggy might be exposed to be caught by a car while passing over a level crossing, or a man might be driving sheep or cattle over a crossing, or a motor car might break down on the track at the crossing, or a motor car in winter going along the gravelled way might skid across the ditch and on to the track. To these instances may be added that of straying animals.

In their Lordships' judgment, notwithstanding contentions to the contrary, the respondents were under a legal duty by their servants to be on watch for the safety of people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers: this affords a legal basis for the finding of the jury. No doubt on the part of the wayfarer there was also a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence. The jury here found the appellant was not guilty of contributory negligence. In effect, therefore, the appellant was lawfully on the highway, and was neither a trespasser nor a mere licensee, nor was he there at his own risk. It is true that he was on the track much against his will, and it is also true that the circumstances under which he was there were abnormal and very unlikely to occur. But the jury must be taken to have been familiar with local conditions and to have weighed all the facts of the case when they found as they did that the respondents were negligent, and by that negligence caused the appellant injuries and damage. It cannot, in their Lordships' opinion, be said of that finding that it was without evidence or perverse: that is enough to dispose of the case unless there is some reason of law on which the verdict should be upset.

It was objected on behalf of the respondents that there was no evidence on which the jury could reasonably find that the headlight was out of order, but their Lordships do not agree with this contention; nor do their Lordships think that it was essential for the appellant's case to establish some particular defect; in a case like this it was enough to show that the headlight in fact was not then functioning properly. It was further objected that the respondents discharged any possible legal duty in regard to the headlight, because they had used reasonable care to have a headlight which was sufficient according to the ordinary standards, and had supplied a headlight of recognized standard make and of a type commonly in use. But the question is not as to the general sufficiency at other times of the headlight, but whether it was so out of order when the journey was undertaken that it was negligent to proceed with it in that condition. It was further objected that the respondents had satisfied the statutory requirements by having a signal light and hence could not be held liable in damages on the well known principle that a person cannot be held to answer for damage caused by carrying out an operation authorized under statutory

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powers, if the statutory conditions are fulfilled. This principle is illustrated by *Canadian Pacific Ry. Co.* v. *Roy.* (1) But the principle only applies if the authorized operation is conducted without negligence, whereas in this case there is a finding of negligence; and, further, their Lordships do not think that the provisions contained in the agreements scheduled to the Act of 1904 are of a nature to bring the principle into operation. The statutes recognize as basic the travelling public's rights on the highways just as in the case of *Rex* v. *Broad* (2), where, though the railway company was given by statute a preferential, but not exclusive, right of way at the highway crossing over the railway, this Board held that those using the highway had still " the right to have some appropriate measure of care observed by those directing the train."

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the judgment of the trial judge be restored, and that the respondents pay the appellant his costs of this appeal and his costs in the Courts below.

Solicitors for appellant: *Raymond Oliver & Co.*
Solicitors for respondents: *Blake & Redden.*

(1) [1902] A. C. 220.
(2) [1915] A. C. 1110.

[PRIVY COUNCIL.]

J. C.*
1932
Nov. 4.

VANDEPITTE . . . . APPELLANT;

AND

PREFERRED ACCIDENT INSURANCE CORPORATION OF NEW YORK . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Insurance—Motor Car—Third Party Risk—Motor Car driven by Insured's Permission—Judgment against Driver for Negligence—Action defended by Insurer—Action against Insurer to recover unsatisfied Judgment—Estoppel—"Insured"—Insurance Act, 1925 (*Stat. of B. C.*, 1925, *c.* 20), *s.* 24.

The appellant obtained a judgment in British Columbia against B.'s daughter for damages for personal injuries caused by her negligence while driving B.'s motor car with his permission. Execution issued, but nothing was recovered. B. had effected in respect of his car an insurance in his own name with the respondents, and they had taken charge of the defence of the action. By the policy the respondents agreed to indemnify the insured against third party risks, and that the indemnity should be available to any person operating the car with the permission of the insured. The appellant sued the respondents to recover the amount of the unsatisfied judgment, contending that B.'s daughter was insured against the liability by the policy, and that the respondents were therefore liable to her under s. 24 of the (British Columbia) Insurance Act, 1925.

Held, that the section above mentioned applies only where the person liable under the judgment is insured by an actual contract in law, and that the action failed, as there was no evidence that B. had contracted on behalf of anybody but himself; even if the section had a wider application the action failed, because there was no evidence that B. intended to create a beneficial interest for his daughter, nor did the fact that the respondents conducted the defence of the action raise an estoppel available to the appellant.

Judgment of the Supreme Court of Canada [1932] S. C. R. 22 affirmed.

APPEAL (No. 11 of 1932) by special leave from a judgment of the Supreme Court of Canada (October 6, 1931) reversing a judgment of the Court of Appeal of British Columbia (June 30, 1930), which affirmed the judgment of a judge of the Supreme Court of that Province.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

The appellant brought an action in the Supreme Court of British Columbia against the respondents to recover from them, by virtue of s. 24 of the Insurance Act, 1925, of British Columbia, the amount of an unsatisfied judgment which she had obtained against Jean Berry. That judgment was for damages for personal injuries due to the negligence of Jean Berry while driving with the permission of her father, R. E. Berry, a motor car belonging to him. At the date of the accident there was in force a policy of insurance in respect of the car effected by R. E. Berry with the respondents, and they had taken over and conducted the defence of the action against Jean Berry. The appellant contended that Jean Berry was insured by the policy against the liability within the meaning of the above section.

The material terms of the Insurance Act, 1925, also those of the policy and the other facts of the case appear from the judgment of the Judicial Committee.

The Supreme Court of Canada (Duff, Newcombe, Rinfret, Lamont and Cannon JJ.), reversing the decisions in the lower Courts, dismissed the action on the grounds that Jean Berry was not insured by the policy and that no estoppel arose. The appeal is reported at [1932] S. C. R. 22.

1932. July 25, 26. *Pritt K.C.* and *Wilfrid Barton* for the appellant. Having regard to the final clause of the policy, which extended the indemnity against third party risks to persons driving the car with R. E. Berry's permission, and the fact that Jean Berry habitually did so, it is to be inferred that he effected the policy upon her behalf as well as upon his own. She ratified the contract by leaving the defence of the action to the respondents in compliance with the conditions of the policy. Marine insurance policies are commonly effected in the name of an agent for the parties interested: Arnould on Marine Insurance, s. 172. In *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (1), except for some observations by Lord Atkinson, the judgments did not question the validity of that form of policy, the plaintiffs' claim being

(1) [1906] A. C. 336.

rejected only upon the ground that an intention to cover their risk was not proved. The appellant gave consideration in that the premium covered the extended indemnity contracted for on her behalf: *Phelps* v. *Prothero* (1); also, by performing the condition of the policy that the defence of an action should be left to the respondents: *Fleming* v. *Bank of New Zealand.* (2) By submitting to the condition she, in the words of the final clause, made the policy "available" to her. Even if Jean Berry was not a party in law to the contract her father was her trustee in relation to the additional risk covered, and she was therefore "insured" within the meaning of s. 25 of the Insurance Act, 1925: *Waters* v. *Monarch Life and Fire Assurance Co.* (3); *Williams* v. *Baltic Insurance Association of London.* (4) Further, the respondents by taking over the defence of the action represented to the appellant that the latter was insured by the policy, and they are estopped from denying that that was the case. Although s. 153 of the Insurance Act, 1925, provides that every policy shall contain the name of the insured, s. 25 is not in terms confined to a person who is named as the insured. The final clause of the policy draws a distinction between the "named insured" and "persons entitled to indemnity" under the clause; the word "insured" in s. 25 is used in the latter sense. If the appellant cannot recover under s. 25, the final clause of the policy is nugatory. [Reference was made to the Third Party (Rights against Insurers) Act, 1930, and the Road Traffic Act, 1930, Pt. II.]

Tilley K.C. for the respondents was not called upon.

Nov. 4. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant, Alice Marie Vandepitte, sustained injuries on March 5, 1928, owing to the motor car, in which she was a passenger and which her husband was driving, being involved in a collision with a motor car driven by Jean Berry. Jean Berry was the daughter of R. E. Berry

(1) (1855) 16 C. B. 370, 394.
(2) [1900] A. C. 577, 585.
(3) (1856) 5 El. & Bl. 870.
(4) [1924] 2 K. B. 282.

and was driving the car, which was her father's property, with his permission. As she was a minor living with her father, he was civilly liable, under s. 12 of the Motor Vehicles Amendment Act, 1927, of British Columbia, for injuries sustained by the appellant due to his daughter's negligence, but in the case the appellant brought her action in the Supreme Court of British Columbia against Jean Berry, claiming that she was injured by Jean Berry's negligent driving. In the proceedings, the appellant's husband, E. J. Vandepitte, was brought in as third party. On June 13, 1928, judgment was given for the appellant for $4600 and costs against Jean Berry, and for Jean Berry against E. J. Vandepitte for $2300 and costs on the basis that both drivers were negligent in the same degree. The appellant issued an execution against Jean Berry, but it was returned unsatisfied. Thereupon, on May 20, 1929, the appellant brought the present action in the Supreme Court of British Columbia, against the respondents, claiming to recover $5648.71, the amount of the judgment and costs, in virtue of s. 24 of the Insurance Act of British Columbia (c. 20 of 1925). The appellant succeeded in the Supreme Court and on appeal in the Court of Appeal of British Columbia, but in the Supreme Court of Canada the respondents' appeal was allowed, and the appellant's action was dismissed with costs throughout. From that judgment the matter comes on appeal by special leave before their Lordships.

Sect. 24 of the Insurance Act (c. 20 of 1925) is in the following terms: "Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

Sect. 10 is as follows: "(1.) Every contract by way of gaming or wagering is void. (2.) A contract is deemed to be a gaming or wagering contract where the insured has no interest in the subject-matter of the contract."

Part VII. of the Act contains special provisions relating to automobile insurance, among which is s. 152, which provides that no insurer shall make a contract for a period exceeding fourteen days without a written application therefor, signed by the applicant or his agent duly authorized in writing, and sets out the particulars required.

Sect. 153 is in the following terms: "Every policy shall contain the name and address of the insurer, the name, address, and occupation or business of the insured, the name of the person to whom the insurance-money is payable, the premium or other consideration for the insurance, the subject-matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which such liability is to accrue, and the term of the insurance."

Sect. 154 contains statutory conditions which are to be deemed to be part of any contract in force in the Province and to be printed on every policy, including para. 8, which reads as follows: "(1.) Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the insured shall promptly give written notice thereof to the insurer, with the fullest information obtainable at the time. The insured shall give like notice, with full particulars of any claim made on account of such accident, and every writ, letter, document or advice received by the insured from or on behalf of any claimant shall be immediately forwarded to the insurer. (2.) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal. (3.) No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer, and no such action shall lie in either event unless brought within one year thereafter."

The policy here in question was for a period from noon on April 14, 1927, to noon on April 14, 1928. It was issued on a form of application as required by the statute, signed by R. E. Berry as the insured. The policy was headed "Combination Automobile Policy No. A. 12498," and embodied contracts between the insured R. E. Berry and two separate insurance companies, the New Jersey Insurance Company and the Preferred Accident Insurance Company, the respondents. It embodied the terms of the application by R. E. Berry and the Statutory Conditions. Sections A, B and C defined the obligations of the former company in respect of damage to or loss of the insured automobile, and section D defined the same company's obligation in respect of "legal liability for damage to property of others," which was expressed to be to indemnify the insured against loss by reason of the legal liability imposed by law upon the insured "in respect of damage done to property." Section E embodied the obligations of the respondents and was in the following terms:—

"*Section E.—Legal Liability for Bodily Injuries or Death.*—(1.) To indemnify the insured against loss from the liability imposed by law upon the insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons . . . . as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of one person the insurer's liability under this section shall not exceed the sum of five thousand dollars ($5,000.00), and subject to the same limit for each person the insurer's liability on account of bodily injuries to or the death of more than one person as the result of one accident shall not exceed the sum of ten

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thousand dollars ($10,000.00). (2.) To serve the insured in the investigation of every accident covered by this policy and in the adjustment, or negotiations therefor, of any claim resulting therefrom. (3.) To defend in the name and on behalf of the insured any civil actions which may at any time be brought against the insured on account of such injuries, including actions alleging such injuries and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the insurer shall elect to settle such actions. (4.) To pay all costs taxed against the insured in any legal proceeding defended by the insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the insurer's limit of liability, as hereinbefore expressed. (5.) To reimburse the insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained."

The final clause of the policy was as follows: "The foregoing indemnity provided by sections D and/or E shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the named insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named insured shall in writing direct."

It was contended on behalf of the appellant that under the policy, and in the events which happened, Jean Berry was the insured within s. 24 of the Act, and hence that the respondents were liable to pay the appellant the amount of the loss. The contention was put in the alternative, either that Jean Berry was directly and in law a party to the contract being within the description of the persons other than R. E. Berry to whom the indemnity was available or that if not in law a party to the contract, she was a cestui que trust of the promise contained in the contract to extend the indemnity to such a person as herself, R. E. Berry having so stipulated as trustee. There is a further contention based on estoppel which may be considered separately and later.

The first mode of stating the appellant's case involves that R. E. Berry as his daughter's agent made a contract of insurance between her and the respondents. But a contract can arise only if there is the animus contrahendi between the parties; there is here no evidence that Jean Berry ever had any conception that she had entered into any contract of insurance. She certainly took no direct part in the conclusion of whatever contract there was. The policy was entirely arranged between R. E. Berry and the respondents, and he alone filled in and signed in his own name and behalf the application required by s. 152 of the statute.

It is said that the wide words defining the persons to whom the indemnity is available are sufficient to found the inference that R. E. Berry was intending to contract not only on behalf of himself but of any one who might come within the policy words "any person or persons while riding in or legally operating the automobile for private or pleasure purposes" with the appropriate permission, and reliance in support of this contention was placed on the well known rule in regard to marine policies in which only the name of the agents need be stated, and which are expressed to be made by them "as agents" or more frequently "as well in their own name as for and in the name or names of all and every person to whom the same doth may or shall appertain in whole or in part." But even under these wide words no one can claim the benefit of the policy, even if answering the general description, unless it is established that the person who directed the insurance to be effected actually intended to cover that particular person, or at least some one who should answer the description. The mere generality of the language is not in itself sufficient. Thus in *Graham Joint Stock Shipping Co.* v. *Merchants' Marine Insurance Co.* (1) it was held that the policy only protected the owner and not the mortgagees: the rule had been previously illustrated by many cases, including *Boston Fruit Co.* v. *British & Foreign Marine Insurance Co.* (1), and also by *Yangtsze Insurance Association,* v. *Lukmanjee.* (2) In the present case there is no evidence that R. E. Berry had any intention to insure any one but himself; even if in some cases the words of the policy taken with the surrounding circumstances might be held to found the necessary inference of intention that inference would fail here by reason of the statutory application. But even if he had so intended, he had no authority from Jean Berry to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. In these circumstances it is impossible to say that a contract existed between Jean Berry and the respondents, that is, it cannot be held that she was in law " insured " under the policy. This conclusion is arrived at quite apart from the provision of s. 153 of the statute, which requires the insured's name and other particulars to be inserted in the policy. It is also arrived at apart from the form of the policy, which throughout, in referring to the insured, refers back as a matter of construction to the named insured R. E. Berry, who filled in the statutory application form. The very clause on which the contention is based draws a pointed distinction merely as matter of words between " the insured " and " any person or persons riding, etc." and between the named insured and " the other persons entitled to indemnity under the terms of this section." Furthermore there was no consideration proceeding from Jean Berry.

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(1) [1924] A. C. 294.

It is, however, argued on behalf of the appellant that even if their Lordships should hold, as they do, that Jean Berry was not a party in law to the insurance contract, she was a party in equity, and in that way was " insured " by the respondents within the meaning of s. 24. These two steps of the argument require separate consideration.

The contention firstly is that R. E. Berry, as part of the bargain and for the consideration proceeding from him,

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(1) [1906] A. C. 336.

(2) [1918] A. C. 585.

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stipulated that the respondents should indemnify his daughter, Jean Berry, as coming under the general words of description, in the same manner and under the same conditions as himself, that is, that he created a trust of that chose in action for her as beneficiary.

It cannot be questioned that abstractly such a trusteeship is competent. No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1): "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam." In that case, as in *Tweddle* v. *Atkinson* (2), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as, for instance, *Robertson* v. *Wait* (3); *Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ld.* (4); *Lloyd's* v. *Harper* (5)—namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant. But, though the general rule is clear, the present question is whether R. E. Berry can be held in this case to have constituted such a trust. But here again the intention to

(1) [1915] A. C. 847, 853.
(2) (1861) 1 B. & S. 393.
(3) (1853) 8 Ex. 299.
(4) [1919] A. C. 801.
(5) (1880) 16 Ch. D. 290.

constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words of the policy. Thus in *Irving* v. *Richardson* (1) a mortgagee effected in the usual form an insurance on the full value of the ship. He claimed to recover the full amount, which was in excess of the mortgage debt, on the general principle now embodied in s. 14, sub-s. 2, of the Marine Insurance Act, 1906, that a mortgagee may insure on behalf and for the benefit of other persons interested as well as for his own benefit, "and recovering the whole, will hold the surplus beyond his own debt in trust for the mortgagor or other persons interested." It was held that the plaintiff was not entitled beyond the extent of his interest, that is, the mortgage debt, because he did not satisfy the jury of his actual intention in effecting the insurance to cover more than that.

In the present case, there are not only the difficulties arising from the statutory provisions quoted above, but there is no evidence that R. E. Berry had any intention to create a beneficial interest for Jean Berry, either specifically or as member of a described class. Indeed, at no time either when the policy was effected or before or after the accident is there any suggestion that R. E. Berry had any such idea. It is true that she was in the habit of driving the insured automobile, but if R. E. Berry read the clause or thought of the matter at all, he would naturally expect that if she did damage the claim would, under the Act quoted, be against him, as she was a minor living in his family. There is a further difficulty in the appellant's way under this head: R. E. Berry is the contracting party in law, but he has no insurable interest in Jean Berry's personal liability, since natural love and affection does not give such an interest in law. Whenever she drove the car, if she was an insured person, she had an insurable interest in the chance that she might be held liable in damages for negligence, but on the assumption now being considered—namely, that she was no more than a cestui que trust in regard to the insurance—the contracting party was R. E. Berry, who had no insurable interest: hence the policy, in respect of that particular risk, was void under the express words of s. 10 of the statute cited above. No doubt it has been held as a special rule in certain cases that a person having a special property in goods can insure on behalf and for the benefit of other persons interested as well as for his own benefit, as is illustrated by s. 14, sub-s. 2, of the Marine Insurance Act, 1906, and *Waters* v. *Monarch Life and Fire Assurance Co.* (1), but here no question of a special property in goods was involved: R. E. Berry had no insurable interest in the possible liability of his daughter. But if it is to be said that the cestui que trust is to be treated as if in law the contracting party, then Jean Berry must have satisfied the requirements of the statute, as being the "insured," in particular ss. 152 and 153, which it cannot be said that she did. There is a further objection to applying to her case the idea of her being the cestui que trust under the policy, since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract, whereas in an insurance such as that contended for serious duties and obligations rest on any person claiming to be insured, which necessarily involve consent and privity of contract.

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(1) (1831) 2 B. & Ad. 193.

Their Lordships are of opinion that no trusteeship is here made out, but in any case they could not hold that the provisions of s. 24 were satisfied by anything but a contract at law, enforceable directly against the insurers by the insured in her own name. That section must be read with the relevant sections of the Act, which have been quoted above, and also with the terms of the policy. In their Lordships' opinion, an equitable right in Jean Berry (even if it were constituted) enforceable only in the name of the statutory insured, R. E. Berry, would not satisfy s. 24, which involves an added burden on the insurance company, and must be strictly construed.

A decision of Roche J. in *Williams* v. *Baltic Insurance Association of London*, (2), has been relied on by the appellants'

(1) 5 El. & Bl. 870.

(2) [1924] 2 K. B. 282.

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counsel. The facts in that case and the contractual terms were, however, different from those in question here and the provisions of the relevant statutes were not the same: nor is it clear whether the learned judge treated the driver of the car as directly insured or as a cestui que trust. Their Lordships have not been able to derive from that case any principles helpful to the issue now before the Board.

The decision their Lordships have arrived at involves the conclusion that the final paragraph of the policy gives no enforceable right to any one. The clause constitutes, in their opinion, merely a promissory representation or statement of an intention on the part of the insurers not binding in law or equity. On the other hand, "honour policies" are common in insurance business, and any insurance company which failed to fulfil its "honourable obligations" would be liable to pay in loss of business reputation. The defence in the present case is, however, taken under somewhat unusual circumstances in a claim by strangers on a special statutory enactment: neither Jean Berry nor R. E. Berry is asserting any right.

The appellant raised a further point that even if in fact she was not the insured within the meaning of s. 24, she became so by reason of an estoppel. But the only estoppel alleged was a matter between the respondents and Jean Berry: the respondents took up and conducted Jean Berry's defence in the claim for damages, and it was said that in doing so they conclusively admitted she was the insured. Even, however, if that were so, that would not benefit the appellant, because she was no party to any such estoppel, and further s. 24 is dealing with one who is insured in fact and by an actual contract. Their Lordships do not think, however, that any such estoppel is made out even as between Jean Berry and the respondents. This point also fails.

In their Lordships' opinion the appeal should be dismissed with costs, and they will humbly so advise His Majesty.

Solicitors for appellant: *White & Leonard.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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CIPRIANI AND OTHERS . . . . APPELLANTS;

AND

BURNETT . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad—Contract—Condition precedent to Action—Award of specified Tribunal—Sweepstake.

A contract may make the award of a specified tribunal a condition precedent to an action at law without doing so in terms.

The tickets sold for a sweepstake in connection with a race meeting in Trinidad stated: "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matters connected with the drawing of the sweepstake, or the awarding of the prizes, the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final."

Held, that the terms of the ticket, having regard to the circumstances belonging to it, made a decision by the stewards a condition precedent to any action to recover the stakes.

Judgment of the Supreme Court of Trinidad and Tobago reversed.

APPEAL (No. 115 of 1931) from a judgment of the Supreme Court of Trinidad and Tobago (June 13, 1931).

The respondent bought a ticket in a sweepstake in connection with a race meeting in Trinidad. The sweepstake was excepted from a local Ordinance declaring that contracts for the sale of lottery tickets were to be void and unenforceable. Printed upon the ticket there was a condition, fully set out in the judgment of the Judicial Committee, that upon any dispute arising the decision of the stewards of the Trinidad Turf Club was to be final. Upon the drawing taking place the owner of another ticket was declared to be the winner of the first prize. The respondent brought an action in the Supreme Court claiming a declaration that according to the correct manner of conducting the drawing his ticket was the first prize ticket, and payment accordingly; he did not allege fraud or want of bona fides.

Belcher C.J., who tried the action, entered judgment for the respondent. He held that the condition printed on the

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* *Present:* LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

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ticket did not make a decision by the stewards a condition precedent to a right of action, and, upon the facts, that according to the correct way of conducting the drawing the respondent's ticket was the first prize ticket.

1932. Nov. 17. *Cave K.C.* and *Willes* for the appellants.

Sir R. Mitchell Banks K.C. and *Merlin* for the respondent.

For the appellants reference was made to the decisions mentioned in the judgment; for the respondent to *Braunstein* v. *Accidental Death Insurance Co.* (1); *Dawson* v. *Lord Fitzgerald* (2); and *Collins* v. *Locke.* (3)

Nov. 17. The judgment of their Lordships was delivered by

LORD MACMILLAN. Their Lordships are invited in this case to assume the novel duty of adjudication as to the winner of a sweepstake. The law of Trinidad is apparently less stringent than that of the United Kingdom on the subject. There the Gambling Prevention Ordinance (Laws of Trinidad and Tobago, 1925, c. 28) by s. 10 enacts as follows: "Every sale or contract for the sale of a lottery ticket is hereby declared to be void and no action shall be maintained by any person in respect of any such sale or contract, except by the purchaser for the return of the money or other consideration, if any, paid thereon." But by s. 15 it is provided that: "Nothing in this Ordinance contained shall apply to any lottery or sweepstake organised and controlled by the Trinidad Turf Club or by any racing club or association affiliated to the Trinidad Turf Club at or in connection with any race meeting held under the auspices of any such club or association."

The sweepstake which has given rise to the present appeal was organized and controlled by the New Union Park Turf Club, a racing club affiliated to the Trinidad Turf Club, in connection with their Easter race meeting in 1931, and being thus a sweepstake of the character described in the section just quoted, its legality was not called in question.

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(1) (1861) 1 B. & S. 782.

(2) (1876) L. R. 1 Ex. D. 257.

(3) (1879) 4 App. Cas. 674.

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In order to understand how the controversy arose it is necessary to describe briefly the system on which the sweepstake was conducted. Tickets bearing a serial letter and a serial number were issued by the promoters and sold to the public, and the winning tickets were subsequently ascertained by a draw. The apparatus of the draw consisted of: (1.) a revolving sphere in which were placed a number of small balls, each marked with a letter corresponding to one of the series of letters on the tickets, and (2.) a board on which were fixed in a row four revolving discs bearing equally spaced round their circumferences ten figures from 0 to 9, each disc being so placed in relation to a flexible pointer that when the disc came to rest after being spun the pointer indicated a particular figure on the circumference. There were also a number of sealed envelopes each containing the name of a horse which was running at the race meeting. The method of operating the apparatus was to revolve the sphere and then by opening a trap in the bottom of it to release one of the lettered balls which it contained. This gave the serial letter of a ticket. Simultaneously the four discs on the board were spun and when they came to rest the four numbers indicated by the pointers were read off, and in this way the serial number of a ticket was obtained. The combined letter and number were then displayed on a blackboard in presence of the assembled public and written on one of the sealed envelopes. The process was repeated until each envelope had been marked with a letter and number. At the conclusion of the race meeting the envelopes were opened and the owner of the ticket whose letter and number corresponded to the letter and number written on the envelope which was found to contain the name of the horse which had obtained the highest aggregate of points at the meeting was declared the winner of the first prize, which consisted of 25 per cent. of the pool. There were also prizes consisting of diminishing percentages of the pool for each of the next seven horses, and 10 per cent. of the pool was divisible among the holders of the tickets representing the remaining horses. The balance of the pool, amounting to

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38½ per cent., was apportioned in stated percentages to the sellers of tickets, the horse-owners, charity, the Turf Club Fund, and expenses The tickets, in addition to showing the manner in which the pool was to be distributed, bore on their face (inter alia) the following printed matter: "This ticket is sold subject to the condition that in the event of any dispute arising with respect to any matters connected with drawing of the sweepstake or the awarding of the prizes the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final.

Payments will be made on horses in the order of running as placed by the judge, subject to the result of any objection that may be made within a fortnight of the race having been run. . . . . The decimal method of drawing will be used."

Now, what happened on the occasion in question was this. Mr. Cipriani, one of the present appellants, who is the president of the Club and mayor of Port of Spain, presided at the draw, which was held in public on April 2, 1931, and the procedure above described was followed. No question arises as to the drawing of the serial letters, but objection has been taken to the manner in which the figures were declared. What Mr. Cipriani did was to spin the four discs on the board, which lay facing him on a table, and when the discs stopped to read off from right to left the figure which each pointer indicated. Among the letters and figures thus ascertained was B 9351, which was the distinguishing mark of the ticket owned by Mr Guevara, one of the present appellants, and as B 9351 was written upon the envelope subsequently found to contain the name of the first horse, Mr. Guevara was accordingly declared to be the winner of the first prize. If Mr. Cipriani had read off the figures from left to right the winning ticket would have been B 1539, which is the distinguishing mark of the ticket owned by Mr. Burnett, the present respondent.

On April 13, 1931, Mr. Burnett's solicitor wrote to the secretary of the New Union Park Turf Club, claiming payment of the first prize on his client's behalf on the ground that at the draw the winning number had been incorrectly declared as B 9351, owing to the figures having been wrongly read from right to left, whereas it should have been declared as B 1539, as it would have been if the figures had been properly read from left to right. Proceedings were subsequently taken in the Supreme Court of Trinidad and Tobago by Mr. Burnett against Mr. Cipriani and others as representing the Club, in which he claimed a declaration that ticket B 1539 was the first prize ticket and that he was the holder of it and an order for payment to him of the amount of the first prize accordingly. Mr. Guevara, as the holder of ticket B 9351, which had been declared to be the winning ticket, was allowed to intervene as a co-defendant. Defences were lodged in which the defendants, in addition to maintaining that the holder of ticket B 9351 had been declared to have drawn the horse which scored the highest number of points and was consequently entitled to the first prize, founded upon the terms of the sweepstake as set out on the tickets, and submitted that it was thereby made a condition precedent of any right of action by the holder of a ticket that any dispute connected with the drawing of the sweepstake or the awarding of the prizes should first be determined by the final decision of the stewards of the Trinidad Turf Club and that, as the dispute which had arisen was one connected with the drawing of the sweepstake or the awarding of the prizes, and there was no decision thereon by the stewards, this condition precedent had not been satisfied. The case came before the learned Chief Justice, Sir Charles Frederick Belcher, who, after hearing evidence and argument, pronounced judgment, declaring that as the holder of ticket B 1539 the plaintiff was entitled to the first prize in the sweepstake, and ordering the defendants (other than Guevara) to make payment to him of the amount thereof. Leave to appeal to this Board having been granted, the matter is now before their Lordships.

In their Lordships' view, the question which must be determined in the first place is whether the plaintiff (now the respondent) had, in the absence of a decision in his favour

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by the stewards of the Trinidad Turf Club, any right of action at all. The ticket, which embodies the contract on which he sues, expressly requires him, as a condition of the sale to him of his ticket, to accept as final the decision of the stewards of the Trinidad Turf Club on any dispute arising with respect to any matters connected with the drawing of the sweepstake or the awarding of the prizes. The dispute between the parties is plainly of such a character, but the respondent gives the go-by to this condition, subject to which he purchased the ticket, and asks that the Court shall substitute its judgment for that of the stewards of the Trinidad Turf Club. Their Lordships are of opinion that he is not entitled to do so.

The learned Chief Justice states the question to be "whether the true construction of the first paragraph printed in the sweep ticket here is that it is such a provision as to fall within the principle of *Scott* v. *Avery* (1), so that the decision of the stewards is a condition precedent of any action, which would then strictly speaking be not on the original contract, but on the stewards' award as appointed arbitrators; or whether the clause is mere matter of procedure for ascertaining the parties' rights, with nothing in it to exclude a right of action on the contract itself, but leaving open to the defendant club an application to stay the proceedings under s. 4 of the Arbitration Ordinance (c. 77)." His answer is that the clause "does not in its true construction require the plaintiff to go to arbitration as a condition precedent to action or mean that he has no cause of action except upon such decision as the stewards may give."

Their Lordships agree that the question is one of construction, but in their view the learned Chief Justice has misconceived the effect of the condition printed on the ticket. It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent of any legal proceedings. In *Scott* v. *Avery* (1) the contract so prescribed, and the action was held not to be

(1) (1856) 5 H. L. C. 811.

maintainable in the absence of an award, but Lord Campbell in his speech referred to *Brown* v. *Overbury* (1) as being identical in principle, and in the latter case, where the Court refused to entertain a claim for the prize in a sweepstake on a horse race, in the absence of a decision by the stewards as to the winner, the clause in the rules of the race provided no more, according to the report, than that any dispute as to the race was to be decided by the award of four stewards.

Baron Alderson pointed out that: "Every contract must be determined according to the circumstances belonging to it. This is one of racing, and the universal practice has been, that, in order to ascertain who is to have the stakes, it must first be determined who is the winner, not in the opinion of a jury, but of the persons appointed to decide it, viz., the judge or the stewards." Baron Martin said: "The judgment of the stewards in the case of a horse race must necessarily be conclusive; they are expressly appointed to decide the matter, and there is no appeal from them. It is a condition precedent to the plaintiff's right to recover, that he obtain the judgment of the stewards."

Reference may also be made to the case of *Dines* v. *Wolfe* (2) before this Board, where it was pointed out that a rule of the Australian Jockey Club, referring any question as to the age of a horse to the final decision of the stewards, excluded any such question from the consideration of a jury.

Their Lordships recognize that in *Brown* v. *Overbury* (1) the dispute was as to which horse was the winner, whereas in the present case the dispute is as to what was the number of the winning ticket which was drawn, but the one type of question is as appropriate as the other for the determination of the stewards. It is a condition of the legality of a sweepstake in Trinidad that it shall be "controlled" by the club which organizes it, and the provision in this case as to the manner of determining disputes connected with the drawing of the sweepstake is a reasonable exercise and incident of that control. Their Lordships accordingly read the condition on the ticket, having regard to "the

(1) (1856) 11 Ex. 715, 716, 717. (2) (1869) L. R. 2 P. C. 280, 289, 290.

circumstances belonging to it," as a condition precedent, the fulfilment of which is essential before any action for the stakes can be entertained by the Courts. The respondent produces no decision in his favour by the stewards of the Trinidad Turf Club, by whose decision he contracted to be bound. Having thus failed to fulfil the condition precedent of his right to sue, he cannot be heard to ask that the Court instead of the stewards should decide the dispute which he has raised. He claims that by the rules of the game he was entitled to be declared the winner, while he at the same time declines himself to abide by the rules.

Such being their Lordships' judgment, it becomes unnecessary for them to pronounce upon the merits of the dispute or to follow the learned Chief Justice in his acute analysis of the facts. It may be that the machine was not operated as it was intended to be worked, but it is at least satisfactory to note that there is no suggestion that Mr. Cipriani's mistake, if mistake it was, in the method of declaring the figures, was made otherwise than in good faith. It appears that throughout the draw he read all the figures the same way—namely, from right to left, and, that being so, the result was just as fortuitous as if he had read them all from left to right. The sweepstake, as their Lordships have observed, was controlled by the Club, and there would appear to have been nothing to prevent the Club, through its representative, from deciding in which way the figures should be read, provided that the decision preceded the ascertainment of the figures. It would certainly be improper for the person conducting the draw to decide, after the figures were known by the discs coming to rest, in which order he would read them, for that would plainly introduce an element of choice into a process intended to depend for its result entirely on chance.

Their Lordships will humbly advise His Majesty that the judgment of the Chief Justice of June 15, 1931, be recalled and the action dismissed. The appellants will have their costs here and below.

Solicitors for appellants: *Maples, Teesdale & Co.*

Solicitors for respondent: *Markby, Stewart & Wadesons.*

[PRIVY COUNCIL.]

A. E. CAMPBELL . . . . APPELLANT;

AND

T. E. ROFE . . . . RESPONDENT.

J. C.*
1932
Nov. 28.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales—Company—Power of Directors—Issue of Preference Shares—Memorandum and Articles—" Terms and Conditions "—" Business of the Company."

By the memorandum of association of a company incorporated under the Companies Act, 1899, of New South Wales, the material provisions of which Act were similar to the law as to English companies, the company was to have power to issue with preferential rights part of the shares in its original capital thereby stated. The articles of association contained no express power to issue preference shares as part of the original capital. Article 10 provided that the shares should be under the control of the directors, who might allot them on such " terms and conditions " as they thought fit. By article 117 the management of the " business of the company " was vested in the directors who, in addition to the powers otherwise expressly conferred on them, might do all such things as the company might do, save those which by the articles or statute were to be done in general meeting. The articles gave the company power in general meeting to create new shares, and gave the directors authority, in the absence of a direction by the general meeting, to issue the new shares with preferential rights.

Held, that the express power given by the memorandum to issue part of the original capital with preferential rights could be exercised by the company in the absence of an article to the contrary, and that under article 10 the directors had authority to exercise the power of the company in that respect. Even if that was not so, the directors had that authority under article 117.

Judgment of the High Court of Australia, 45 C. L. R. 82, reversed.

APPEAL (No. 132 of 1931) by special leave from a judgment of the High Court of Australia (May 1, 1931) reversing a judgment of the Supreme Court of New South Wales, in Equity (October 13, 1930), and restoring an order of the Master in Equity.

The proceedings arose in the compulsory winding up of a company incorporated in New South Wales under the

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, and SIR LANCELOT SANDERSON.

Companies Act, 1899, of that State, the material provisions of which were the same as those relating to English companies at that date.

The liquidator, since deceased and represented by the appellant, applied to the Supreme Court under s. 107 of the Act that the name of the respondent should be included in the list of contributories in respect of 8000 preference shares which he had applied for and been allotted by the directors. The respondent opposed the application upon the ground that the directors had no power under the memorandum and articles of association to issue the shares.

The material provisions of the memorandum and articles appear from the judgment of the Judicial Committee.

The Master in Equity dismissed the application, but his order was reversed by Harvey C.J. in Equity. Upon a further appeal to the High Court of Australia the order of the Master was restored. The grounds of the decisions are stated in the present judgment. The judgment of the High Court of Australia is reported at 45 C. L. R. 82.

Special leave to appeal was granted upon the condition that the appellant abandoned an alternative claim against the respondent for calls as an ordinary shareholder in respect of the 8000 shares.

1932. Nov. 4. *Gavin Simonds K.C.* and *J. H. Stamp* for the appellant.

Lionel Cohen K.C. and *Cyril Radcliffe* for the respondent.

In addition to authorities mentioned in the judgment reference was made for the appellant to *In re Patent File Co.* (1) and *In re Australian Estates and Mortgage Co.* (2); also to Palmer's Company Precedents, 1st ed., pp. 183–4.

Nov. 28. The judgment of their Lordships was delivered by

LORD THANKERTON. This case arises out of the proceedings in the compulsory liquidation of the Marlow-Rolls Theatres, Ld. (hereinafter called "the company"), of which the appellant is the official liquidator. The company, which had

(1) (1870) L. R. 6 Ch. 83.

(2) [1910] 1 Ch. 414, 424.

a brief existence, was incorporated in New South Wales on December 29, 1928, and went into liquidation on September 4, 1929.

The appellant sought to place the respondent on the list of contributories in respect of 8000 preference shares allotted to him by the directors of the company on March 12, 1929, on the respondent's application therefor dated March 7, 1929. The respondent disputed his liability to be placed on the list of contributories on the ground that no preference shares were ever validly created by the company. There was no resolution of the company creating preference shares, and the sole question in this appeal is whether the directors had power under the memorandum and articles of association of the company to issue these shares to the respondent.

On May 3, 1930, the Master in Equity decided that the respondent was not liable as a contributory; this order was reversed on October 13, 1930, by the Supreme Court of New South Wales (Harvey C.J. in Equity), but was restored by the High Court of Australia on December 17, 1931, from whose decision the present appeal is taken.

Clause 5 of the company's memorandum is as follows: "5. The capital of the company is 250,000*l.* divided into 250,000 shares of 1*l.* each, with power to divide the shares in the capital for the time being into several classes and to attach thereto respectively and (sic) preferential, deferred, qualified, or special rights, privileges or conditions."

The relevant articles of association are as follows:—

"7. The capital is 250,000*l.* and comprises 250,000 shares of 1*l.* each.

10. The shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit and with full power to give to any person the call of any shares either at par or at a premium and for such time and for such consideration as the directors think fit. The directors may reserve any of the shares in the original or increased capital of the company upon such terms

as to payment for same and otherwise as they may deem expedient.

46. The company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient.

48. The new shares shall be issued to such persons and upon such terms and conditions and with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof shall direct and if no directions be given as the directors shall determine and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of the assets of the company and with a special or without any right of voting.

50. Except so far as otherwise provided by the conditions of issue (sic) or by these presents any capital raised by the creation of new shares shall be considered part of the original capital and shall be subject to the provisions herein contained with reference to the payment of calls and instalments transfer and transmission forfeiture lien voting and otherwise.

51. The company may from time to time by special resolution reduce its capital by paying off capital or cancelling capital which has been lost or is unrepresented by available assets or reducing the liability on the shares or otherwise as may seem expedient and capital may be paid off upon the footing that it may be called up again or otherwise. Provided that should a part of the issued capital at any time consist of preference shares the repayment of such preference share capital shall not be effected unless the holders of at least three-fourths of the preference shares shall so agree.

117. The management of the business of the company shall be vested in the directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the statutes and of these presents and regulations from time to

time made by the company in general meeting. Provided that no regulations so made shall invalidate any prior act of the directors which would have been valid if such regulations had not been made.

118. The board may from time to time at their discretion raise or borrow or secure the payment of any sum or sums of money for the purposes of the company.

119. The board may raise or secure the payment or repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit and in particular by the issue of debentures or debenture stock (terminable or perpetual) of the company charged upon all or any part of the property and assets of the company (both present and future) including its uncalled and/or unpaid capital for the time being.

127. Subject to the rights attached to shares issued on special conditions and subject as aforesaid the profits of the company shall be divisible among the members in proportion to the capital paid up or deemed to be paid up on the shares held by them respectively. Provided that where capital is paid up on any shares in advance of calls upon the footing that the same shall carry interest such capital shall not whilst carrying interest confer a right to participate in profits.

146. Each holder of registered shares whether preference or ordinary whose registered place of address is not in the Commonwealth of Australia may from time to time notify in writing to the company an address which shall be deemed his registered place of address within the meaning of these articles of association.

147. As regards those members whether holding preference or ordinary shares who have no registered place of address a notice posted up at the office shall be deemed to be well served on such members at the expiration of twenty-four hours after such posting up.

154. If the company shall be wound up and the assets available for distribution among the members as such shall be insufficient to repay the whole of the paid-up capital such assets shall be distributed so that as nearly as may be the

losses shall be borne by the members in proportion to the capital paid up or deemed to be paid up or which ought to have been paid up at the commencement of the winding up on the shares held by them respectively. And if in a winding up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up or deemed to be paid up at the commencement of the winding up the excess shall be distributed among the members in proportion to the capital at the commencement of the winding up paid up or deemed to be paid up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the right of the holders of shares issued upon special terms and conditions."

The respondent's application for preference shares was in response to a prospectus issued by the directors early in 1929, offering 22,000 ten per cent. cumulative participating preference shares of 1*l.* each for public subscription, and the question is whether the issue of these preference shares was within the powers conferred on the directors by article 10 or otherwise by article 117.

It is agreed that, under the express terms of the memorandum, there is a corporate power to issue preference shares, and the points for decision are (*a*) whether the existing articles, so long as unaltered, restrict the company to the issue of shares with equal rights, in which case the directors cannot hold any wider powers under article 10 or article 117, or (*b*) if the company is not so restricted, whether the power of the company to issue different classes of shares is communicated to the directors by either of these articles. The New South Wales company law, which is governed by the Companies Act of 1899 of New South Wales, as regards the issue in this case may be taken as similar to the English company law of that period.

The Master in Equity held that article 7 constituted an agreement on the part of the members of the company that the shares in the original capital should be characterized by equality inter se, and that none of the other articles modified that agreement. In his view article 10 referred to terms and conditions to be attached to allotment and disposal of shares, but not to terms and conditions altering the character of the shares themselves, and the powers conferred on the directors by article 117 could not include a power which the company did not itself possess. He based his conclusion on the opinion of Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper*. (1)

On appeal, Harvey C.J. declined to accept the Master's construction of article 7, and stated "whether the memorandum says that the company may issue shares of different classes or is silent on the subject, it is clear law that the company has the power to issue shares of different classes, and the only question is whether it is incumbent on the company in its articles of association to say that it does propose to do so before it can effectively exercise that power. In my opinion the decision in *Andrews* v. *Gas Meter Co.* (2) must be taken as indicating that the Court of Appeal considered that such an expression of intention had to be found within the four corners of the articles of association," He further stated, "It is not necessary, of course, that the words 'preference shares' or 'different classes of shares' should be used; all that is necessary is that the articles should contain some express words indicating that all shareholders may not necessarily be on the same footing. That being so, it is necessary to turn to these articles to see whether there is such an express provision in them. Article 117 does not, in my opinion, touch the matter. That article does not give the directors power to do anything which the company itself, in general meeting, could not do. The case is then narrowed down to the question whether article 10 authorizes the directors to issue preference shares." On consideration of article 10, and certain other articles, the learned judge held that the words "terms and conditions" included preferential rights.

In the High Court of Australia the learned judges unanimously held: (1.) that it could no longer be maintained that article 7 amounted to a contract inter socios that the shares should be uniform and rank equally; (2.) that article 10 did not deal with the classification of shares, but only with the terms and conditions of their allotment and disposal; and (3.) that article 117 was concerned only with the management of the business of the company and not with the relations of members of the company inter se.

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(1) [1894] A. C. 399, 417.

(2) [1897] 1 Ch. 361.

The law on this subject is very fully laid down in the judgment of the Court of Appeal, delivered by Lindley L.J. in *Andrews* v. *Gas Meter Co.* (1), where the earlier decisions are reviewed and the dictum of Lord Macnaghten in *British and American Trustee and Finance Corporation* v. *Couper* (2) is referred to. The law may be summarized as follows: While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the articles of association, which may be altered from time to time by special resolution of the company. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the articles of association. If nothing is said in the memorandum, the articles of association may provide for the issue of the authorized capital in the form of preference shares; if the articles do not so provide, or do provide for equality inter socios, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution.

The present case is not dealt with in that judgment, and appears to have now arisen for decision for the first time, for here the memorandum deals with the matter to the extent of giving the company power to issue (inter alia) preference shares as part of the original capital. In the existing articles there is no express provision for preference shares as part of the original capital, but there is such express provision as

(1) [1897] 1 Ch. 361.

(2) [1894] A. C. 399, 416.

regards any future issue of new shares. In these circumstances their Lordships are of opinion that in the absence of any article clearly restricting the company in that respect the company is entitled to exercise the powers expressly conferred on it by the memorandum. Their Lordships are unable to find any such restriction in the existing articles, and they are accordingly of opinion that the company has power to issue part of the original capital as preference shares.

As regards the powers conferred on the directors by article 10, their Lordships have come to the conclusion that they include the power to control the character of the shares and that the words "terms and conditions" have a wider meaning than the respondent seeks to have placed upon them. Any uncertainty arises from the want of consistency in the use of the words rights, privileges, terms and conditions throughout the articles, but it seems clear that in article 127 the term "conditions" is used as including provisions as to preferential rights.

In this view, article 117, which only purports to confer additional powers, does not include the powers conferred by article 10, but, if their Lordships had taken a different view as to article 10, they would have been prepared to hold that article 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, and that such delegation would include power to issue preference shares. Their Lordships are unable to agree with the narrow construction of the words "management of the business of the company" adopted by the High Court.

Their Lordships are, therefore, of opinion that the respondent is liable to be placed on the list of contributories, that the order appealed from should be reversed and that the order of the Chief Judge in Equity should be restored, the appellant to have the costs of this appeal and his costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

Solicitors for respondent: *Elvy Robb & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* THOMAS . . . . APPELLANT;

1932

AND

Nov. 15.

OCEAN COAL COMPANY, LIMITED . RESPONDENTS.

Workmen's Compensation—Injury from Accident—" Arising out of and in the course of" Employment—Statutory Regulation—Breach—Added Peril—Employers' Trade or Business—Act done "for purposes of and in connection with"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1, 2.

A miner was employed as a hitcher in charge of the pit bottom. His proper place was on the loading side, but he was expected to help in case of need in handling empty trams on the other, or "empty" side. By a regulation under the Coal Mines Act, 1911, "No person shall attempt to go on or across the uncovered space of the shaft bottom except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such place unless the cages are stopped." The regulation was posted up in the proper place and the miner was aware of its contents. There was a passage round the pit, and that was the proper way by which to go from the "empty" side to the "full" side.

After seeing a full tram safely into a cage the man signalled the cage up and then ran across the pit under the ascending cage and reached the "empty" side. He then hurried back across the pit bottom to be at his place on the full side to receive the descending cage, but before he could reach that side the descending cage caught him and killed him. Both the crossing and re-crossing of the pit bottom were for the purposes of and in connection with the business of his employers.

In a claim for compensation under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, by the widow and sole dependant of the deceased man:—

Held that, by virtue of s. 1, sub-s. 2, the accident causing the injury was to be deemed to have arisen out of and in the course of the deceased man's employment, notwithstanding that he was, at the time when the accident happened, acting in contravention of a statutory regulation applicable to his employment.

Wilsons and Clyde Coal Co. v. *M'Ferrin* [1926] A. C. 377 followed; *M'Aulay* v. *James Dunlop & Co.* [1926] A. C. 377, 380, *Garrallan Coal Co.* v. *Devlin* [1927] A. C. 59, and *Stephen* v. *Cooper* [1929] A. C. 570 distinguished; *Hannaby* v. *Llay Main Collieries* [1931] 1 K. B. 602 criticized.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal dismissing an appeal from the judge of the County Court of Glamorganshire holden at Bridgend, who dismissed a claim for compensation under the Workmen's Compensation Act, 1925, by the widow of a miner who met his death by an accident.

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

The facts are stated in the opinion of Lord Buckmaster and are summarized in the headnote.

The material sections of the Workmen's Compensation Act, 1925, are the following :—

Sect. 1, sub-s. 1 : "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained : Provided that— . . . . (*b*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

Sub-s. 2 : "For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

The county court judge considered himself bound by *Stephen* v. *Cooper* (1) to hold that by adding a serious peril to his employment the deceased man had placed himself without the scope of his employment and that therefore the claimant could not recover.

The Court of Appeal (Lord Hanworth M.R. and Lawrence and Slesser L.JJ.) upheld the decision of the county court judge.

The claimant appealed.

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(1) [1929] A. C. 570.

Oct. 18, 20. *Upjohn K.C.*, *G. Kirkhouse Jenkins K.C.* and *Joshua Davies* for the appellant. The county court judge was wrong in holding that *Stephen* v. *Cooper* (1) obliged him to decide against the appellant. The two cases do not raise the same question. The question in *Stephen* v. *Cooper* (1) was whether there was any evidence to support the finding of the arbitrator that the accident did not arise out of the injured man's employment. The Court of Appeal and this House held that there was some evidence to support that finding. In the present case, but for the statutory regulation, there could be no doubt that the accident arose out of and in the course of the deceased man's employment, and the question is whether, notwithstanding the breach of the regulation, the accident is to be deemed to have arisen out of and in the course of the employment. *Stephen* v. *Cooper* (1) raised a question under what is now s. 1, sub-s. 1, of the Act of 1925. The present case raises a question under s. 1, sub-s. 2, of that Act. It is submitted that it falls exactly within that sub-section.

The history of this legislation shows where the fallacy lies which has misled the Courts below. In cases under the Act of 1906, the question being whether the accident, the cause of the injury, arose out of and in the course of the man's employment, it was often argued and held that if the accident happened while the man was infringing a statutory or other regulation, that fact of itself placed the accident outside the man's employment: see *Bourton* v. *Beauchamp* (2); *Widdart* v. *Chislet Colliery Co.* (3); *A. G. Moore & Co.* v. *Donnelly.* (4) It was thought that these decisions might deprive a workman of compensation who had broken some rule or regulation made for his safety, even in a case where he was doing his best in his master's interest; and to avoid this hardship s. 7 of the Act of 1923 was passed, the effect of which was that a man working in the course of his employment did not oust his act from the course of his employment by the mere breach of a regulation, but that in a certain event the

(1) [1929] A. C. 570.
(2) [1920] A. C. 1001.
(3) (1920) 13 B. W. C. C. 157.
(4) [1921] 1 A. C. 329.

accident was to be deemed to arise out of and in the course of the employment, even though the man was injured while infringing the regulation ; and the event was that the man, when he met with the accident, should have been acting for the purposes of and in connection with his employers' trade or business. Sect. 7 of the Act of 1923 is re-enacted in the same terms in s. 1, sub-s. 2, of the Act of 1925. The result is that if it is found that the injured man was, when the accident happened, acting for the purposes of and in connection with his employers' business, the accident is to be deemed to have arisen out of and in the course of the man's employment ; but if that fact is not found, then the accident must still be held to have arisen outside the scope of the employment : compare *M'Aulay* v. *James Dunlop & Co.* (1), *Garrallan Coal Co.* v. *Devlin* (2), where the man was not acting for the purposes of and in connection with his employers' business, with *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (3), where the man was so acting. The present case is on all fours with *M'Ferrin's* case. (3)

Now the finding, the absence of which was fatal to the claims in *M'Aulay* v. *James Dunlop & Co.* (1) and *Stephen* v. *Cooper* (4), and the presence of which (5) entitled the claimant in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (3) to compensation, is present in the case now before this House. If the finding of the county court judge in this case had been that the act of the deceased man was not for the purposes of and in connection with his employers' business, the case would have been on all fours with *Garrallan Coal Co.* v. *Devlin* (2), and this appeal would be doomed to fail, but as the finding is the exact opposite—namely, that the act was for the purposes of and in connection with the employers' business, it is submitted that the appeal should succeed.

Sir Walter Greaves-Lord K.C. and *Edgar Dale* for the respondents. Regulations are not all of equal force and effect. There are regulations so imperative that the breach of them may preclude a claimant from raising the question whether

(1) [1926] A. C. 380.
(2) [1927] A. C. 59.
(3) [1926] A. C. 377.
(4) [1929] A. C. 570.
(5) See 1925 S. C. 329, 330.

an injured man was at the time of the accident acting for the purposes of and in connection with his employers' business. A miner who was injured by an explosion, having, in breach of a statutory regulation, taken upon himself to couple an electric cable to a detonator, was held to have put himself outside the course of his employment: *M'Aulay* v. *James Dunlop & Co.* (1); and even though the man was injured while he was in fact acting for the purposes of and in connection with his employers' business, yet, as he was not minding his own business but was arrogating to himself the duty of another man, it was held that the accident could not be deemed to have arisen out of and in the course of his employment. *Stephen* v. *Cooper* (2) is to the same effect. The man in that case was clearly acting for the purposes of and in connection with his employer's business in attempting to attach the chain to the backband of one of the horses drawing the threshing machine, but he placed himself outside the scope of his employment by choosing the method he adopted—namely, of walking along the pole between the horses. Other examples of an act which, though done for the purposes of and in connection with the employer's trade or business, are yet of a kind to take the man who does them out of the scope of his employment, may be found in *Herbert* v. *Samuel Fox & Co.* (3) and *Lancashire and Yorkshire Ry. Co.* v. *Highley.* (4)

It is a mistake to suppose that s. 1 of the Act of 1925, or s. 7 of the Act of 1923 which preceded it, has laid down new conditions of claiming compensation. The accident must still arise out of and in the course of the injured man's employment: see *Wilsons and Clyde Coal Co.* v. *M'Ferrin*, per Lord Dunedin. (5) To put it shortly, the case must come within s. 1, sub-s. 1, of the Act of 1925 before the claimant can invoke sub-s. 2; if it is not within sub-s. 1 it avails him nothing to say that the injured man, having put himself outside the scope of his employment, was in truth acting

(1) [1926] A. C. 377, 380.
(2) [1929] A. C. 570.
(3) [1916] 1 A. C. 405.
(4) [1917] A. C. 352.
(5) [1926] A. C. 377, 385.

in pursuance of and in connection with his employers' business.

The question in this case is whether the deceased man in running to and fro across the pit bottom was doing an act of the class to which the acts in *M'Aulay* v. *James Dunlop & Co.* (1) and *Stephen* v. *Cooper* (2) belong, or doing an act of the class exemplified by the act in *Wilsons and Clyde Coal Co.* v. *M'Ferrin.* (3) Rightly understood, the county court judge has answered this question by holding that the act of the deceased man, Thomas, was of the former class. This finding excludes the appellant from s. 1, sub-s. 1, of the Act. It is true that the county court judge has found that the act of Thomas was for the purposes of and in connection with his employers' trade or business, but that finding does not assist the appellant, because a claimant who cannot bring himself within s. 1, sub-s. 1, cannot avail himself of s. 1, sub-s. 2.

Upjohn K.C. in reply. The deceased man was in the course of his employment but for the regulation. The breach of a regulation does not now take a man out of the course of his employment if the man is acting, as Thomas has been found to have been acting, "for the purposes of and in connection with his employer's trade or business." Circumstances in which the statute directs that the accident shall be deemed to arise out of the employment have been relied on by the Court of Appeal as reasons for holding that the accident did not arise out of the employment.

The House took time for consideration.

Nov. 15. LORD BUCKMASTER. My Lords, the appellant is the widow of a man who, while in the employment of the respondents, lost his life on April 17, 1931, in the respondents' collieries through being crushed by a descending cage at the bottom of the pit. She claimed 300*l.* as compensation under the Workmen's Compensation Act, but her claim was rejected by the learned county court judge who sat as arbitrator, and his award has been upheld by the Court of Appeal.

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(1) [1926] A. C. 377, 380.
(2) [1929] A. C. 570.
(3) [1926] A. C. 378.

The facts relating to the accident have been carefully found by the learned county court judge, and are as follows :—

(1.) The deceased man was a hitcher ; his work was to be in charge of the pit bottom, attend to the winding signals, close and open the gates, and help so far as necessary in getting full trams and empty trams into and out of the cages ; his proper place was on the loading or full tram side of the pit bottom, but he was expected to assist in cases of emergency in dealing with empty trams on the other side of the pit.

(2.) On the occasion in question, the deceased workman crossed the pit bottom to see to the proper working of empties towards the main road, and almost at once dashed back to cross under the descending cage towards his proper working side in order to be ready to receive that cage when it landed, but before he could get fully across the pit bottom the descending cage caught him and killed him.

(3.) The crossing and re-crossing of the pit bottom were for the purposes of and in connection with the employers' business.

So to cross the shaft bottom was expressly prohibited by one of the general regulations made under the Coal Mines Act, 1911, which is in the following terms : "No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such place unless the cages are stopped."

The effect of such a regulation is to restrict the operation of s. 1, sub-s. 1, of the Workmen's Compensation Act, because the forbidden act is by reason of its prohibition an act that does not arise out of and in the course of the workman's employment. In other words, if without the prohibition an injury might be held to be due to an accident arising out of and in the course of employment, should that accident be due to the forbidden act, it can no longer be so regarded. The effect of this result has been modified by s. 1, sub-s. 2, of the Act of 1925, replacing the Act of 1923, which, omitting words not material to the present purpose, is as follows: Section 1.—" Liability of employers to workmen for injuries."

Sub-s. 1: " If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained."

Sub-s. 2: " For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment . . . . if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

Now at first sight it would appear that the words of this statute are open to the interpretation that, in case of death or serious and permanent disablement owing to a prohibited act, there is substituted for the inquiry whether the accident arose out of and in the course of the employment another and a different test—namely, whether the act causing the injury was done by the workman " for the purposes of and in connection with his employer's trade or business." This interpretation has, however, been rejected by this House in the case of *Garrallan Coal Co.* v. *Devlin* (1), and even more expressly in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2), where Lord Dunedin clearly stated that such an interpretation was obviously untenable, and that the true view of the statute was that it must first be ascertained if, disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment, and then the effect of the prohibition in removing the accident from that category might be annulled if the later condition as to the act being for the purposes of the employer's business were fulfilled.

(1) [1927] A. C. 59.

(2) [1926] A. C .377, 385.

The distinction is critical in the present case. The finding of the county court judge is clear, nor indeed could it well have been otherwise, that the act of the workman was for the purposes of the employer's business; and we are therefore thrown back to the consideration of whether, if the regulation had not existed, the accident arose out of and in the course of employment.

This consideration shows that the reliance placed by Mr. Upjohn on the case of *M'Ferrin* (1) was mistaken. In that case a man, contrary to regulation, went to inspect a charge shortly after it had been fired, believing it to have been discharged. He was mistaken in his belief and was injured by its delayed explosion. That, apart from the prohibition, the injury was due to an accident arising out of and in the course of his employment was plain, and all that was left was to consider if the act was done for the purposes of and in connection with his employer's trade or business, and, as this was equally plain, the workman's right to compensation was secure; but that does not cover the present case.

The learned county court judge, whose award was upheld by the Court of Appeal, has rightly proceeded along the lines I have indicated, but it is his final investigation as to whether the accident arose out of and in the course of the employment that has caused me the gravest difficulty. He has not held as a matter of fact that the accident did not so arise, but he has reasoned himself to this conclusion in the belief that he was so constrained by the authority of *Stephen* v. *Cooper*. (2) The workman there had, without putting the knives out of action, walked along the pole of a mowing machine in order to adjust the harness of one of the horses, which had become detached, and the horses, starting, had thrown him under the knives which had caused him serious injury. The arbitrator had found that the act was not done in connection with the respondent's business, but was an act of bravado, and that the injury was not due to an accident arising out of and in the course of his employment.

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(1) [1926] A. C. 377.

(2) [1929] A. C. 570.

The decision did no more than say that there was evidence on which the arbitrator could so find; but the doctrine of an "added peril" was referred to by Lord Hailsham, where he says (1): "There was ample evidence to justify the arbitrator in finding that the principle of 'added peril' applies to the present case, and that consequently there was evidence on which he could properly find that the injury was not due to an accident arising out of employment."

I agree with the Master of the Rolls in thinking that such a phrase is not a touchstone whereby to determine whether or not the man was acting within his employment, and it would, I think, be unfortunate if this phrase got crystallized into a form of test, and an accident should be looked at according to the meaning of these words instead of relying, as reliance must be placed, upon the words of the Act of Parliament.

This is clearly expressed by Lord Dunedin in the case of *Plumb* v. *Cobden Flour Mills Co.* (2) in these words: "It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the Courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself." In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can, of course, be so reckless

(1) [1929] A. C. 574.

(2) [1914] A. C. 62, 65, 66.

and so unnecessary as to take it outside the meaning of the statute, and this was what happened in the case of the *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1), and again, according to the arbitrator, in *Stephen* v. *Cooper.* (2) The learned judge here has held that, having regard to what was said in *Stephen* v. *Cooper* (2), he was " bound to hold " that the adding of the peril placed the workman's act outside the scope of his employment. I do not think he was so bound. I think the case of *Stephen* v. *Cooper* (2) introduced no new law. In my opinion it merely followed an earlier decision.

If this be so, the learned county court judge was not under the constraint by which he thought he was compelled, and the real question, which is a question of fact, remains undecided. In these circumstances it might be possible to remit the case once more to the arbitrator, but as the facts are free from dispute, it seems to me we ought to take upon ourselves the responsibility of deciding whether they take the case outside the statute or no. That is to say, whether, if there never had been a regulation forbidding what the man did, the injury that resulted was due to an accident arising out of and in the course of his employment ? I think, upon the whole, that it was. It arose out of his employment certainly, and was, in my opinion, in the course of it, seeing that, apart from the prohibition, the action, although hazardous, was due to the man's desire to expedite the process he was engaged to control. I think the case of *Garrallan Coal Co.* v. *Devlin* (3) affords assistance in reaching this conclusion. The circumstances there were identical with those in the present case, with this exception that there was nothing to show in that case that the workman had any work to do at the pit bottom, and it was because of this that his claim failed. But it is impossible to read the report without realizing that the result might, and indeed I think would, have been different had it once been established that the man had been engaged in working at the bottom of the pit. For these reasons I think the judgment of the

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(1) [1917] A. C. 352.
(2) [1929] A. C. 570.
(3) [1927] A. C. 59.

Court of Appeal should be reversed, and the award of the arbitrator set aside, and that in lieu thereof the sum of 300*l.*, which is the accepted sum, should be awarded to the appellant.

LORD BLANESBURGH. My Lords, in my judgment this appeal should be allowed. The issue, as I see it, with the findings of the learned arbitrator in view, depends upon the true effect of s. 1, sub-s. 2, of the Workmen's Compensation Act, 1925, read in connection with s. 1, sub-s. 1, and not ignoring s. 1, sub-s. 1 (*b*), of the same Act. The association of the sub-section in question with s. 1, sub-s. 1, is of course complete. Its relation to s. 1, sub-s. 1 (*b*), historically and otherwise, will prove, if I am not mistaken, to be illuminating. Merely for convenience of reference, I once again transcribe these three sub-sections as they are grouped in the present Act:—

" 1.—(1.) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained:

" Provided that . . . . (*b*) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall [unless the injury results in death or serious and permanent disablement] be disallowed.

" (2.) For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

Of the sub-sections, s. 1, sub-s. 1, and s. 1, sub-s. 1 (*b*), are to be found in the Workmen's Compensation Act, 1897, but in that Act s. 1, sub-s. 1 (*b*), appeared without the words which I have enclosed in square brackets. Both as here printed are found in the Act of 1906.

As to s. 1, sub-s. 2, it was first brought into the code as s. 7 of the Act of 1923, and in judgments, even after 1925, it is frequently still so referred to. I will also here, for convenience sake, sometimes refer to it as s. 7. Its close similarity to s. 1, sub-s. 1 (*b*), is immediately obvious, the reason, of course, being that its enactment in 1923 was designed to bring within the range of compensation certain classes of serious accident which had been excluded therefrom by the judicial interpretation placed upon s. 1, sub-s. 1 (*b*). Parliament did not question the correctness of that interpretation, and s. 1, sub-s. 1 (*b*), remains part of the statute quite unamended. It is merely superseded in its relation to those accidents for which special provision was made by the new section.

The outstanding judicial decisions referred to were three in number, all of them decisions of this House. Two stressed the point that no relief could be forthcoming under s. 1, sub-s. 1 (*b*), unless it still remained true to say of an accident attributable to the serious and wilful misconduct of the workman that it had actually arisen out of and in the course of his employment. The third illustrated the result of that ruling where the relevant disobedience consisted in the breach of a statutory or other regulation.

In *Barnes* v. *Nunnery Colliery Co.* (1), the first of them, Lord Loreburn said: "The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct," and the true meaning and effect in this respect of the sub-section was fully elaborated by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (2), where, in a passage which although often cited will bear repetition here, he says: "You have first to show that the accident arises out of the employment. Then in the older Act"—that is the Act of 1897—"came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act"—that is the Act of 1906—"to cases where the injury did not result in death or serious and permanent disablement. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment." And in the case of an order disobeyed by a workman, such a case as that with which your Lordships are concerned in the present appeal, it was in *Plumb's* case (1) laid down that the right of the injured workman or his dependants to recover, notwithstanding his misconduct, depended upon the question whether the order which he had disobeyed truly limited the sphere of the employment or whether it amounted merely to a direction not to do certain things or to do them in a certain way within the sphere of the employment. If the order disobeyed were of the first class there could be no compensation. In Lord Sumner's words from *Highley's* case (2), also so frequently quoted, it could be no part of the employment of a workman thus disobedient "to hazard, to suffer, or to do that which caused his injury."

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(1) [1912] A. C. 44, 47.

(2) [1914] A. C. 62, 69.

But it was the decision in *A. G. Moore & Co.* v. *Donnelly* (3) which was effective to bring s. 7 on to the statute book. That in my view is the most pregnant authority in this case. I am myself satisfied that if its effect had been always appreciated, and if the true meaning of its counterpart, *M'Ferrin's* case (4)—a s. 7 case—had always been realized, the order now appealed from could never have been made.

The facts in *Donnelly's* case (3) can be shortly stated. The

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(1) [1914] A. C. 62, 69.

(2) [1917] A. C. 352, 372.

(3) [1921] 1 A. C. 329.

(4) [1926] A. C. 377.

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accident to him arose out of a breach of para. 3 (*a*) of the Explosives in Coal Mines Order of 1913, which provides that if a shot misses fire the person firing the shot shall not approach the shot hole in the case of a shot fired by a fuse and detonator until an interval has elapsed of not less than an hour. Donnelly in the course of his employment fired a shot by means of a fuse and detonator and retired. But in contravention of para. 3 (*a*) of the Order he returned to the place of the shot in less than an hour, when the shot, which had missed fire, blew off in his face and permanently injured him. It was held that the Order was such that his breach of it took him outside the sphere of his employment, so that the risk in which he had involved himslf had ceased to be reasonably incidental to that employment. In other words, his accident had not arisen out of and in the course of his employment as required by s. 1, sub-s. 1, to which, as Lord Dunedin had pointed out, s. 1, sub-s. 1 (*b*), was merely a rider.

From that decision s. 7 very quickly materialized, and as its purpose was, so in the result it was effective to prevent, after it had passed, the refusal of compensation in just such a case as *Donnelly's*. (1) It achieved this in *M'Ferrin's* case (2), which on this point has been, as I see it, completely misunderstood and, so misunderstood, has been the parent of much of the subsequent confusion. But to this I will return later, merely asserting now, as on the authority of this House in *M'Ferrin's* case (2) I do assert, that a man in Donnelly's position is now under s. 7—or s. 1, sub-s. 2, of the present Act—entitled to compensation when under s. 1, sub-s. 1 (*b*), he was and is entitled to none.

It is instructive to see how this result has been accomplished by the new section. It is not by a statutory statement equivalent to an assertion that such an accident as Donnelly's did in fact arise out of and in the course of his employment. Such a statement would not have been true even in the mouth of the Legislature. It has not been made. What the section has said is that such an accident

(1) [1921] 1 A. C. 329.
(2) [1926] A. C. 377.

as Donnelly's, with any other accident covered by the terms of the section, shall be *deemed* to have arisen out of and in the course of the workman's employment whether in fact it did so or not. In other words—differing in this from s. 1, sub-s. 1 (*b*)—s. 1, sub-s. 2, does not require that an accident within its scope shall arise out of and in the course of the employment at all. It is enough that the accident is of such a character that complying with the conditions of the sub-section it may thereunder "be deemed" to have so arisen. And in view of the learned arbitrator's findings in the present case, already detailed by the noble Lord on the Woolsack, and on the plain terms of the sub-section itself, I cannot bring myself to doubt that the accident to the appellant's husband is brought within the express terms of the sub-section. For what are the relevant conditions thereby required to be fulfilled? They seem to be two:—

1. That the deceased was, at the time when the accident happened to him, acting in contravention of a statutory regulation applicable to his employment. To his employment, as described by the learned arbitrator, the regulation in question was clearly applicable, and the deceased was contravening it.

2. That his act was done for the purposes of and in connection with the respondents' trade or business. The sub-section, it will be noticed, does not require that the act should have been done for the purposes of or in connection with the workman's employment, although the regulation must have been one applicable to that employment. Here, the requirement of the sub-section has in set terms been found by the learned arbitrator to have been satisfied. And his finding is without qualification accepted by the respondents.

That, my Lords, I should have thought was enough for the appellant to establish. It was then for the respondents to show, if they could, that for some reason entirely unconnected with the breach of the regulation the accident had not occurred out of and in the course of the deceased's employment, so that in relation to his accident s. 1, sub-s. 1, still remained a bar to relief, quite unaffected by s. 1, sub-s. 2. But no such case was made by the respondents. The resulting position is clearly put by Lord Dunedin in *Garrallan Coal Co.* v. *Devlin* (1)—a case on facts substantially identical with those of the present case so far as the employment of the workman and the regulation and its breach are concerned. There Lord Dunedin, having first held that the regulation there and here in question was one of the first class above described—" a prohibition which limited the scope of the employment "—and that the workman was going into a territory where he had no business to go except under certain conditions, proceeded : " That being so, it is quite clear that if it had not been for the recent Act he could not have recovered, because the accident would not have been arising out of his employment. But then comes the recent Act, 1923, and that Act says (s. 7) that the accident shall be deemed to arise out of the employment ' notwithstanding, etc.' " The noble Lord quotes the section and proceeds : " There is no question, therefore, that it falls within the Act, only you must prove it was done in contemplation and furtherance of his employer's business. It is clear that there the onus is upon the workman, and the question is : Has he discharged that onus ? " And, on a review of the arbitrator's award there, containing as it did a finding to the contrary, Lord Dunedin came to the conclusion, and the other noble Lords present agreed with him, that the workman's burden had not been discharged. And for that reason, but for that reason only, the decision went against the claim. It is, I think, indisputable that if the House had had before it in the *Garrallan Coal Co.'s* case (2) an award containing the finding on the all important question of the furtherance of the employer's business which we have here, the House not only would but, on the principles laid down by Lord Dunedin, must have allowed the claim.

So far as I am concerned, my Lords, that is enough for me. Accepting the principles laid down in the *Garrallan Coal Co.'s* case (2), and applying them to the findings in this case, I would, without more, allow the appeal.

(1) [1927] A. C. 59, 67.

(2) Ibid. 59.

But this conclusion, although reached under Lord Dunedin's own guidance in the *Garrallan Coal Co.'s* case (1), is, it is said, suspect in that it does not have due regard to his earlier authoritative exposition of s. 7 which forms the introduction to, and is applied by him in his judgment in, the two cases of *M'Ferrin* and *M'Aulay* (2) heard in this House together. My Lords, I recognize that that exposition is of final authority. But I am equally satisfied that they misunderstand its meaning and effect who find in the passage already cited from the *Garrallan Coal Co.'s* case (1) any inconsistency with it, or anything other than its inevitable development.

Before I go to the exposition itself I would refer to the two judgments to which it was preliminary, and upon which its light was made to fall. *M'Ferrin's* case (2) was, as has already been said, on all fours with *Donnelly's* case. (3) The regulation broken was the same, and it was a regulation which limited the scope of M'Ferrin's employment. There is no possible doubt on that point. It is the central fact which gives its vital significance to the decision; but it is the fact which unfortunately in subsequent decisions has been consistently ignored. Lord Dunedin held M'Ferrin to be entitled to compensation under the section on grounds which he thus explained (4): "The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases" (*Donnelly's* case and *Fife Coal Co.* v. *Sharp* (3)) "namely, that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

On the other hand the claim to compensation by M'Aulay's dependants failed. The short facts of his case (2) are thus stated in the headnote. M'Aulay was a miner

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(1) [1927] A. C. 59.
(2) [1926] A. C. 377.
(3) [1921] 1 A. C. 329.
(4) [1926] A. C. 388.

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engaged with a fireman and another miner in firing by electricity a series of shots in a mine. After one of the shots had exploded he came from his place of safety and coupled the electric cable to the detonator of the next shot. At the time the fireman was moving the handle of his firing battery, which was still attached to the cable, to free some mechanism which had jammed. The shot exploded and M'Aulay was killed. In coupling the cable to the detonator M'Aulay was in breach of a statutory mining regulation which provided that the person authorized in writing by the manager to fire the shots should himself do the coupling. The reason why in these circumstances the claim to compensation failed is thus tersely summarized by Lord Dunedin (1): "The operation of coupling was the work of a skilled man. The unskilled man had no right to meddle with it, and if he meddled was doing something which he was not engaged to do, so s. 7 of the 1923 Act has, for the reasons given above" [i.e., in his preliminary exposition] "no application."

Now, my Lords, *M'Ferrin's* case (2) seems to me to be, in principle, identical with the present. As here, the regulation "applicable to his employment" was one which limited its scope. His case like this came within the express terms of s. 7. There were no *other* circumstances to take it out of s. 1, sub-s. 1. There was nothing therefore effectively to prevent the accident being deemed to be within that sub-section, and compensation followed. But in *M'Aulay's* case (3) there was a vital difference fatal to the claim. Apart altogether from the regulation and its breach M'Aulay was outside of s. 1, sub-s. 1, because at the time of the accident he was doing something he was not engaged to do at all, and s. 7 was powerless to restore him to grace.

In the light of these two contrasted decisions the only difficulty I feel in appreciating fully Lord Dunedin's reasoning in *M'Aulay's* case (3) is that I do not find him attaching any significance to the concluding words of s. 7 already commented on, to which indeed he makes no reference. But he must,

(1) [1926] A. C. 390.
(2) [1926] A. C. 377.
(3) [1926] A. C. 380.

I think, be taken to have been of opinion that these somewhat vague words did not cover such a serious usurpation as M'Aulay's amounted to.

Lord Dunedin's preliminary exposition, to which I now come, is, to my mind, quite clear when it has been illumined by the two decisions of which it was the foundation and by reference to the facts in immediate contemplation when it was made. I may paraphrase it thus. Sect. 7 is self-contained in the sense that so soon as its conditions are complied with the workman or his dependants have made a case for compensation. But not an irrebuttable case. It is still open to the employer to show, founding upon the facts proved in support of the claim or adduced in evidence by himself, that apart altogether from the prohibition disobeyed, and made innocuous by virtue of s. 7, the accident for a totally different reason was outside s. 1, sub-s. 1. It might be shown, for instance, to take Lord Dunedin's own example, that the workman at the time of the accident "was arrogating to himself duties which he was neither engaged nor entitled to perform (1)." In other words the accident did not arise out of and in the course of the workman's employment for a reason with which s. 7 had no concern and to which it offered no answer. In this sense, and I suggest in this sense only, did Lord Dunedin use the words so often referred to (2): "It was hinted at, rather than argued, that the effect of this section was to sweep away altogether the requirement of s. 1 that the accident should arise out of and in the course of the employment. This is obviously an untenable point." And so it was untenable if the contention involved the result that compensation could be claimed by the "arrogating" workman in the circumstances just stated. Sect. 1, sub-s. 1, was certainly not to be swept away altogether. But Lord Dunedin did not mean that it might not quite frequently happen that compensation would be claimable as a result of s. 7 although the accident had not truly arisen out of and in the course

(1) *Kerr* v. *Baird & Co.* 1911 S. C. 701.

(2) [1926] A. C. 385.

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of the employment. *M'Ferrin's* case (1) itself is just such a case. But that will never be so where apart from s. 7 there is some independent ground for taking the accident out of s. 1, sub-s. 1. In such a case, says Lord Dunedin, still adhering to his illustration : " It is not that there is a specific prohibition ; it is that it is not his employment which he was engaged in. There may be a specific prohibition as well, but that does not alter the case." (2)

My Lords, the soundness of Lord Dunedin's pronouncement may be tested by an illustration. There are two men, let us suppose, in the service of the respondents here, one a clerk to whose employment this regulation is not applicable : the other a miner to whose employment it is. They are involved in the same accident, both of them acting for the purposes of and in connection with the respondents' trade or business but both of them at the time arrogating to themselves duties which they were neither engaged nor entitled to perform. Both are killed. According to Lord Dunedin's rule as I interpret it, the dependants would not in either case be entitled to compensation. But if the contention he was combating had been permitted to prevail the dependants of the miner, who was so much the more blameworthy, in that he was committing a breach of a regulation applicable to his employment, would receive compensation, while the dependants of the clerk, relatively less disobedient—for he need never have heard of the regulation at all—would receive none. This illustration as it strikes me at once discloses the meaning of and the necessity for Lord Dunedin's pronouncement.

But, one may ask, if all this is so clear, why should the Court of Appeal, not only in this but in sundry other cases, founding themselves upon Lord Dunedin's rule, and seeking to apply it—why should they have considered themselves bound in effect to refuse compensation in every case under s. 7 where the prohibition broken is one limiting the employment ? That that is the position, according to the present practice of that Court, is clearly shown in the recent case of *Hannaby* v. *Llay Main Collieries* (1), where the Court, although not unanimous in its application, were agreed upon the rule which, while so stated or implied in all the judgments, is expressed in terms most apposite for my present purpose in this passage from the judgment of Slesser L.J. (2): " It is now clear beyond question that, if the workman is injured or killed by an accident caused by an act done in such a way as to take it outside the scope of his employment, the workman cannot recover; and that in such circumstances sub-s. 2 of s. 1 of the Act of 1925"—(which is s. 7 of the Act of 1923)—"which otherwise may save the workman's claim from being defeated where he has done a prohibited act, will not bring back the accident within the sphere of the employment for which the employer is responsible: see the leading case in the House of Lords of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (3) and the many authorities which have followed that decision."

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(1) [1926] A. C. 377.

(2) Ibid. 387.

In these words you have the present practice and the reason for it: you find *M'Ferrin's* case (3) stated in terms unrecognizable when the report itself is referred to. The truth is that in the line of authority to which the Lord Justice refers *M'Ferrin's* case (3) has on this point been quite consistently misunderstood. Thus in *Guest* v. *Gaston & Co.* (4), a case at the beginning of the series, I find Bankes L.J. saying with reference to *M'Ferrin's* case (3): " It was held that the man was entitled to compensation, because he was merely doing in a negligent way an act which was within the scope of his employment."

At the close of the series in *Hannaby* v. *Llay Main Collieries* (1) I find counsel for the employer saying in argument that in *M'Ferrin's* case (3) it was decided that a shot firer was acting within the sphere of his employment, although acting in breach of a regulation, by returning too soon to the place where the shot had exploded, and that [presumably for that reason] he came within the protection of s. 7. This statement, so completely at variance with the true position, as at all events I see it, was not challenged by counsel for the respondents and was apparently assumed to be correct by the Court, being reproduced as above by Slesser L.J. and in terms accepted by the Master of the Rolls, who in his judgment (1), when speaking of *M'Ferrin's* case (2), said that there " it was held that there was a breach of the prohibition within the sphere of employment."

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(1) [1931] 1 K. B. 602.
(2) Ibid. 630.
(3) [1926] A. C. 377.
(4) [1927] 1 K. B. 1, 8.

My Lords, based upon that view of *M'Ferrin's* case (2) (which involved what I must with all respect regard as the mistaken conclusion that there Lord Dunedin had advised compensation under s. 7 only because the regulation broken did not put the workman outside the sphere of the employment) the Court of Appeal has adopted the view that s. 7 does not, any more than does s. 1, sub-s. 1 (*b*), apply to any other than an accident *actually* arising out of and in the course of the employment of the workman. As it is put by the Master of the Rolls in *Hannaby's* case (3), where there has been a prohibition broken the question which arises is " whether the workman has done something lying outside the sphere of his employment or has merely committed a breach of some regulation within the sphere of his employment." In the words of Lawrence L.J. (4): " The question which the learned county court judge had to determine was, whether the workman when he met with his accident had stepped outside the sphere of his employment or whether he was still within that sphere, although acting in contravention of a statutory and employer's prohibition." And acting on that view a full examination of " pre-section 7 cases " becomes essential in order to ascertain whether the regulation broken would then have taken the accident out of s. 1, sub-s. 1, as being due, for example, to " an added risk," or whether it would not—an inquiry quite irrelevant so soon as it is seen, as in my judgment is the case, that s. 7 is quite distinct from s. 1, sub-s. 1 (*b*), and that the regulation which is essentially and primarily within s. 7 is a regulation limiting the employment, the breach of which necessarily takes the accident in fact out of s. 1, sub-s. 1. The principles so enunciated in *Hannaby's* case (1) have been followed in the present case, with the result that the Court of Appeal have here rejected a claim shown to be within the express terms of the section and with nothing to stand in the way of full effect being given to it. The result is indeed extraordinary. Sect. 7—s. 1, sub-s. 2, of the present Act—is held to have no application to the only kind of regulation the breach of which rendered its enactment necessary. Sect. 7 on this view has effected nothing not already and not now covered by s. 1, sub-s. 1 (*b*). It has on this view been powerless to secure compensation for the appellant. If the view be maintained and existing practice be continued, the result must be that s. 1, sub-s. 2, itself—a remedial section—will become a dead letter, a legislative tragedy of the first order.

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(1) [1931] 1 K. B. 613.

(2) [1926] A. C. 377.

(3) [1931] 1 K. B. 608.

(4) Ibid. 621.

I ought to add that had not the learned county court judge mistakenly supposed that the case in this House of *Stephen* v. *Cooper* (2) was a s. 7 case by which he was bound, he would, as he shows by his judgment, have acted upon the view of the *Garrallan Coal Co.'s* case (3) which I have above expressed. That case (3) was before the Court of Appeal and is referred to by Lawrence L.J. along with *Stephen* v. *Cooper*. (2) Unfortunately the Lord Justice turns aside to observe upon the latter case and does not deal with *Garrallan's* case (3) at all. It is difficult to see how the fixed views of the Court of Appeal to the effect above stated could have survived an examination of Lord Dunedin's speech in *Garrallan's* case (3), to say nothing of Lord Wrenbury's in the same case. But it was not made.

In the result, my Lords, I think that this appeal succeeds from whatever angle its consideration is approached.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal (Lord Hanworth M.R.

(1) [1931] 1 K. B. 602.
(2) [1929] A. C. 570.
(3) [1927] A. C. 59.

and Lawrence and Slesser L.JJ.) dated November 25, 1931, affirming an award of the county court judge dismissing the appellant's claim to compensation.

The appellant is the widow and sole dependant of John Thomas, a hitcher employed by the respondents at one of their collieries in the county of Glamorgan. While in such employment he was injured by accident and such injury resulted in his death.

The question is whether on the true construction of s. 1 of the Act of 1925, and in particular of sub-s. 2 thereof, and in the events which have happened, the accident is to be deemed to have arisen out of and in the course of his employment.

The learned county court judge and the learned judges of the Court of Appeal have all answered that question in the negative. Were they right in so doing?

Sub-s. 2 of s. 1 of the Act of 1925 is a transcription verbatim of s. 7 of the Act of 1923. The history of this section is well known. In 1920 it was decided by this House in *A. G. Moore & Co.* v. *Donnelly* (1) that contravention by the workman of certain mining regulations took the miner outside the sphere of his employment, and that consequently the injury by accident did not in that case arise out of his employment. The section in question was obviously intended to meet what was regarded as a hardship to workmen killed or seriously and permanently disabled.

My Lords, the true construction of s. 7 of the Act of 1923, and therefore of the sub-section now in question, is no longer in doubt, having been settled once for all by the opinion of Lord Dunedin (concurred in by the other noble and learned Lords then sitting) in the two cases of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* and *M'Aulay* v. *James Dunlop & Co.* (2) His view is summed up in the following terms: "It" (namely, the section in question) "does not either repeal or amend the radical provision of the principal Act, that the accident to entitle the workman to compensation must arise out of and in the course of his employment, but it does introduce a far-reaching, though artificial, consideration which prevents a certain class of evidence, available to show that the accident did not arise out of the employment, from being any longer in force." In fact, in the noble and learned Lord's view, if the man was doing something which was not in his employment at all the section would not help him, "for the simple reason that its language does not apply to it. It is not that there is a specific prohibition; it is that it is not his employment which he was engaged in." (1) These views were acted on in the decision of the two cases. In *M'Ferrin's* case (2) the man was engaged in an operation which he was entitled to perform, but in performing it he contravened a statutory regulation and thereby incurred a peril which he would otherwise not have incurred. It was held that the section applied and that the accident must be deemed to have arisen out of his employment. In *M'Aulay's* case (3), on the other hand, the man (a miner) was arrogating to himself the duties of a fireman which he was not entitled to discharge, and on that ground was not entitled to relief though he was at the same time acting in contravention of a regulation.

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(1) [1921] 1 A. C. 329.

(2) [1926] A. C. 377, 386.

In the present case I am of opinion that on the findings of the learned county court judge the employment of the workman included work on both sides, the full side and the empty side, of the pit, and that the passing from one side to the other was one of the things he was engaged to do. But on the occasion in question he passed from one side to the other across the pit bottom in contravention of a regulation to the effect that no person shall attempt to go on or across the uncovered space of the shaft bottom except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such place unless the cages are stopped. In so doing the workman of course incurred an extra peril, but this was the very peril against which the regulation was directed, and if the incurring of such a peril should be held (as it has been held by the arbitrator and by the Court of Appeal in the present case) to prevent the accident from being

(1) [1926] A. C. 387.
(2) [1926] A. C. 378.
(3) Ibid. 380.

deemed to arise out of and in the course of the employment, the operation of the sub-section would be virtually reduced to a nullity.

There is one requirement of the sub-section to be referred to—namely, that "such act"—namely, that which the workman was doing when the accident happened, "was done by the workman for the purposes of and in connection with his employer's trade or business." That this requirement was satisfied has been found by the county court judge in express terms.

In *Garrallan Coal Co.* v. *Devlin* (1) the arbitrator had found that it was not proved that the act in question had been done by the workman for the purposes of and in connection with his employer's trade or business, and on this ground alone the claim to compensation failed. It is clear that but for this defect it would have been held that the section (s. 7 of the Act of 1923) applied: see particularly per Lord Dunedin (2) and per Lord Wrenbury. (3) It is, I confess with all respect, difficult to understand how the learned judges in the Court of Appeal could have come to the conclusion that the added peril involved in the breach of the regulation prevented the application of s. 1, sub-s. 2, in the present case. I can only think that they have all been misled by misunderstanding the case of *Stephen* v. *Cooper*. (4) In that case no question arose upon the construction of the sub-section now in question. Such a point had been originally raised, but had been given up. The case was decided on the ground that the conduct of the workman was outside the scope of the employment and there was no statutory provision, as there is here, to the effect that an accident not actually arising out of the employment may under certain circumstances be deemed so to arise.

In my opinion those circumstances exist in the present case, and the result is that the appeal must be allowed with costs here and below and an award made accordingly.

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(1) [1927] A. C. 59.

(2) Ibid. 67, from "Now I have no hesitation" to the end of the paragraph.

(3) [1927] A. C. 74.

(4) [1929] A. C. 570.

LORD RUSSELL OF KILLOWEN. My Lords, the crucial question which arises in this case is whether the accident, which caused the workman's death, arose out of and in the course of the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925.

If that sub-section had stood alone, unaffected by sub-s. 2, it would be successfully argued that the accident did not so arise. But if the case is governed by the provisions of sub-s. 2, then there is no room for such an argument, because the sub-section enacts that in such event the accident "shall be deemed to arise out of and in the course of the employment" for the purposes of the Act, which purposes include the purposes of sub-s. 1. In other words, the sub-section provides that in the appropriate case the accident, whether or not it did arise out of and in the course of the employment, shall for the purpose of making the employer liable to pay compensation be deemed so to arise.

Before considering the question it may be well to glance at the history of the sub-section. The Act of 1906 contained no provision corresponding with the sub-section. In the year 1921 there came before this House the case of *A. G. Moore & Co.* v. *Donnelly.* (1) In that case Donnelly, a miner, in the course of his employment fired a shot and retired to a place of safety. In contravention of a regulation made under the Coal Mines Act, 1911, he returned to the place of the shot in less than one hour, when the shot blew off and inflicted permanent disablement upon him. It was held that in disobeying the regulation the miner was acting outside the sphere of his employment, and that consequently the injury to the workman had not been caused by an accident arising out of and in the course of his employment. It was pointed out also that the same result would follow if the regulation had not been statutory but had been simply a term of his employment.

As a result of this decision there was enacted s. 7 of the Act of 1923, the words of which are identical with the words

(1) [1921] 1 A. C. 329.

of the present s. 1, sub-s. 2. This s. 7 came under consideration here, and was the subject of decision in your Lordships' house. The case (1) involved the consideration of separate accidents to two workmen called respectively M'Ferrin and M'Aulay.

The facts must be noted. M'Ferrin, a miner, fired a shot and went to a place of safety, and believing that his shot had exploded returned to the shot hole within the period during which all persons were prohibited by statutory regulation from approaching the shot hole. The shot exploded, and he was seriously and permanently disabled. I can detect no relevant distinction between the conduct of M'Ferrin and the conduct of Donnelly in the earlier case. M'Aulay, a miner, was engaged with a fireman in firing by electricity a series of shots in a mine. After one of the shots had exploded he came from his place of safety and coupled the electric cable to the detonator of the next shot. This was a breach of a statutory regulation under or by virtue of which the only person to do the coupling of the cable to the detonator was the fireman. By ill luck the fireman at that moment moved the handle of the firing battery which was still attached to the cable, with the result that the shot exploded, inflicting such injuries on M'Aulay that he died.

It was held that in *M'Ferrin's* case (1) s. 7 of the Act of 1923 applied and that the accident must accordingly be deemed to arise out of and in the course of his employment; but that in *M'Aulay's* case (2) the section did not apply, because he was at the time of the accident arrogating to himself a duty restricted to the fireman.

Lord Dunedin delivered the leading judgment, and he undoubtedly used language in relation to s. 7 of the Act of 1923, which taken in its widest significance would seem to indicate that notwithstanding the words, "shall be deemed to arise out of and in the course of his employment," which occurred in that section, and which now occur in sub-s. 2 of s. 1 of the Act of 1925, it would still be necessary in all

(1) [1926] A. C. 377. (2) Ibid. 380.

cases, before the benefit of the second sub-section could be claimed, to prove that the accident in question did in fact and in law arise out of and in the course of the employment. If this were right *Donnelly's* case (1) would still have to be decided now as it was decided in 1921, for in that case it was plainly stated that the workman, in breaking the regulation, was acting outside the sphere of his employment, i.e., he was doing what he was not employed to do. But M'Ferrin (although like Donnelly he was breaking a regulation and consequently acting outside the sphere of his employment) was held to be protected by s. 7.

The general words used by Lord Dunedin cannot therefore bear their full signification. Indeed, if in all cases before a claimant could claim the benefit of this remedial provision he had to prove that the accident did arise out of and in the course of the employment, it is difficult to see how an opportunity for " deeming " it so to arise could ever present itself. Later portions of Lord Dunedin's speech make his meaning clear. He limited the operation of s. 7 by saying that notwithstanding that section it was still open to the employer to show that the accident did not arise out of the employment by showing " that the workman was doing something which was not his employment," or " doing something different in kind from anything he was required to do." If that were shown then, he said, the case never came within s. 7 at all.

In the result M'Ferrin was held to be covered by s. 7 although he was doing something—namely, going on a prohibited area—which by reason of the prohibition was not within the scope of his employment. He was doing his job, but while doing his job he broke a regulation. On the other hand, M'Aulay was held to be outside the section, because he was doing something which (in addition to being prohibited by the regulation) was not his job at all.

The present case upon its facts, and notwithstanding, but consistently with, the limitation placed by that decision upon the operation of s. 7 of the Act of 1923, falls in my opinion within the provisions of s. 1, sub-s. 2, of the Act of 1925.

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(1) [1921] 1 A. C. 329.

As I read the judgment of the arbitrator here, he finds all the facts necessary to bring the case within the requirements of sub-s. 2. The workman's job took him to both sides of the pit bottom. He had been properly on the empty side and had to get back to the full side. When the accident happened he was doing his job—namely, getting back to the full side—although in doing it he was doing something which, by reason of the regulation, was not within the scope of his employment. That is what M'Ferrin had done, and that, to adopt Lord Dunedin's language, is precisely the case for the application of sub-s. 2.

That this view is correct is, I think, strongly borne out by the opinions expressed in the speeches of Lord Dunedin and Lord Wrenbury in the *Garrallan Coal Co.'s* case. (1) That case and the present one are similar in their facts, except that we have here something which was absent in the *Garrallan Coal Co.'s* case (1)—namely, the finding of the arbitrator that the act in question was done by the workman for the purposes of and in connection with his employer's trade or business. I have no doubt that with such a finding on the record in the *Garrallan Coal Co.'s* case (1) the decision must have been the other way. In that case the arbitrator found that the act of the workman was not proved to have been done by him for the purposes of and in connection with his employer's trade or business. Lord Dunedin, after stating that the regulation (which was the identical regulation here in question) was a prohibition which limited the scope of the employment, continues thus (2): "That being so, it is quite clear that if it had not been for the recent Act he could not have recovered, because the accident would not have been arising out of his employment. But then comes the recent Act, 1923" [and he reads s. 7 and continues:] "There is no question, therefore, that it falls within the Act, only you must prove it was done in contemplation and furtherance of his employer's business. It is clear that there the onus is upon the workman, and the question is: Has he discharged that onus ?" In that case the arbitrator found that he had not. In the present case the applicant has. Lord Wrenbury makes it equally clear that the dependants only failed because there was no finding of the fact which was required by the last words of s. 7.

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(1) [1927] A. C. 59.

(2) Ibid. 67.

The Court of Appeal seem to have decided the present case upon the footing that the arbitrator had found as a fact that the accident did not arise out of or in the course of the employment, and that such a finding must not be disturbed. This appears to me to be a misconception of the arbitrator's judgment. As I read that judgment, the arbitrator would have decided in favour of the applicant upon the strength of sub-s. 2 and the *Garrallan Coal Co.'s* case (1), had it not been for a subsequent decision in this House of *Stephen* v. *Cooper.* (2) The arbitrator treated that case as a decision on the sub-section, and as deciding that if the act which the workman was doing at the time of the accident was outside the scope of his employment and added a peril to it, the sub-section did not apply at all. He accordingly felt bound to hold that the accident did not arise out of the workman's employment and that the claim for compensation failed accordingly. This is not a finding of this as a fact upon the evidence. It is a misdirection based upon a misconception of *Stephen* v. *Cooper.* (2) That case had nothing whatever to do with the sub-section. The arbitrator's finding in *Stephen* v. *Cooper* (2), that the act of the workman was not done for the purposes of and in connection with his employer's trade or business, effectively prevented the sub-section from having any connection with the case. The sub-section is only mentioned in the judgments for the purpose of explaining that it does not arise for consideration. The only decision in the case was that the workman had by his conduct added a peril to his employment, and that he was therefore acting outside the scope of his employment, with the result that the accident could not be said to arise out of his employment as required by s. 1, sub-s. 1. It is

(1) [1927] A. C. 59. (2) [1929] A. C. 570.

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no authority for any purpose in relation to the second sub-section.

A claim for compensation, where the accident results in death or serious and permanent disablement, is placed by the Act upon a more favoured footing than a claim where the accident does not so result. By the proviso (*b*) to s. 1, sub-s. 1, the defence that the injury is attributable to the serious and wilful misconduct of the workman is not open to the employer where death or serious and permanent disablement results. The second sub-section might have been framed upon similar lines, and might merely have provided that the fact that the workman was acting in contravention of a regulation could not be pleaded as a defence. In that case, as in the case of the proviso to sub-s. 1, the requirements of sub-s. 1 would still have had to be fulfilled. The claimant would still have had to prove that the accident arose out of and in the course of the workman's employment. But sub-s. 2 is, and I must assume designedly, framed on other lines. It provides that, if the circumstances there specified in fact exist, then the accident shall be deemed (i.e., whether it does or not) to arise out of and in the course of the workman's employment.

The circumstances which are specified in the sub-section and which are appropriate to the present case are these: (*a*) the accident resulted in death; (*b*) the workman was at the time when the accident happened acting in contravention of a statutory regulation; and (*c*) the act was done by the workman for the purposes of and in connection with his employer's trade or business. They all exist in the present case. The limitation imposed upon the operation of the sub-section by the decision in *M'Aulay's* case (1) does not apply. In accordance, therefore, with the sub-section the accident must be deemed to have arisen out of and in the course of the workman's employment; and it can be no answer for the employer to say that the contravention of the regulation added a peril and put the workman outside the sphere of his employment.

(1) [1926] A. C. 380.

This case in my opinion falls directly within the language used by Lord Dunedin in *M'Ferrin's* case (1), when he said: "The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases"—i.e., *A. G. Moore & Co.* v. *Donnelly* (2) and *Fife Coal Co.* v. *Sharp* (2)—"namely, that the prohibition . . . . made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

For these reasons I would allow this appeal with costs here and below. The order of the Court of Appeal and the award of the arbitrator should be set aside, and an award made in favour of the applicant for the agreed sum of 300*l*.

LORD WRIGHT. My Lords, the findings of fact of the learned county court judge mean in my judgment that at the time of the fatal accident Thomas was busying himself about the job for which he was employed. He was a hitcher "whose proper place was on the loading or full tram side of the pit bottom, but he was expected to assist in case of emergency in dealing with empty trams on the other side of the pit": the judge further says that "having regard to Thomas' character as a workman and to the place where he was seen near the empty trams, I feel bound to draw the inference that he crossed the pit bottom to see to the proper working of the empties towards the main road and there is no doubt that he crossed back under the descending cage towards his proper working side in order to be ready to receive that cage when it landed. Both the crossing and re-crossing of the pit bottom were therefore for the purposes of and in connection with the employer's business."

On these findings it would, I think, be clear that the accident arose out of and in the course of the man's employment, but for the fact that he was, in crossing the pit bottom, acting in contravention of the regulation. On the authorities

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(1) [1926] A. C. 377, 388.

(2) [1921] 1 A. C. 329.

Lord Wright.

as they stood before s. 7 of the Act of 1923, now s. 1, sub-s. 2, of the Act of 1925, and hereafter described as sub-s. 2, his contravening the regulation would have been held to take his case outside the Act: of the many cases cited in this House embodying the rule it is enough to refer to *A. G. Moore & Co.* v. *Donnelly* (1), where it was held that the breach of the regulation expressly excluded the prohibited act from the man's employment, and also involved an added peril which was outside the sphere of the employment.

But the amending section deals (inter alia) in express terms with breaches of regulations, statutory or otherwise, and provides that notwithstanding the breach, the accident, if resulting in death or serious and permanent disablement, "shall be deemed to arise out of and in the course of his employment if such act was done by the workman" (as the judge has here found to be the fact) "for the purposes of and in connection with his employer's trade or business." The peculiar language "deemed to arise" is no doubt chosen to exclude any such rule as was accepted by the Courts in regard to claims where the man had been guilty of serious and wilful misconduct; though the Act provided that in certain events that should be no defence, the claim, so it was held, could still be countered on the reasoning stated above by the plea that the man's breach of regulation took the case outside the Act so as to defeat the claim. The amending provision, by enacting that the accident, notwithstanding the breach, is still to be deemed to arise out of and in the course of the employment, treats the position as a matter of law, so that if once the terms of sub-s. 2 are complied with the claim must succeed, whereas before the amendment on the authorities it must have failed. The position is clearly stated by Lord Dunedin (though only as matter of observation) in *Garrallan Coal Co.* v. *Devlin* (2), where the workman was fatally injured by a breach of the same regulation under circumstances substantially identical with those in the present case, save that sub-s. 2 was not satisfied, because the arbitrator did not find that the act was done in

(1) [1921] 1 A. C. 329.

(2) [1927] A. C. 59, 67.

contemplation and furtherance of the employer's business. On the ground of the absence of that necessary finding, and on that alone, it was held that the claim must fail. Lord Dunedin said that it was quite clear that if it had not been for the amending Act the man could not have recovered, because the accident would not have arisen out of his employment, but that there could be no question that it fell within the Act, subject to proof that it was done in contemplation and furtherance of the man's employment. The change effected by the amending section is also illustrated by comparing with *A. G. Moore & Co.* v. *Donnelly* (1), a case before the amending Act, the cases after the amendment of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2) and *M'Aulay* v. *James Dunlop & Co.* (2) The former of these two later cases was the exact analogue of *Donnelly's* case (1): this House held that by virtue of the amending Act the claim must succeed. Lord Dunedin said (3): "The facts are really precisely the same as they were in the cases of *A. G. Moore & Co.* v. *Donnelly* (1) and *Fife Coal Co.* v. *Sharp* (1), but s. 7 obviously applies, and so the arbitrator and the Court of Session held. The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases—namely, that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

It would accordingly seem to follow that on the facts of this case as found by the judge the claim must succeed. But the simple issue has been complicated by what I venture to think, with deference to the learned Lords Justices, is a misunderstanding of the language which Lord Dunedin used, which has been construed by the Court of Appeal in this and in other cases as meaning that in any case in which

(1) [1921] 1 A. C. 329.
(2) [1926] A. C. 377.
(3) [1926] A. C. 388.

the amending section is invoked there is still a question "of fact and degree" to be determined by the arbitrator—namely, whether, though it is merely the contravention of a prohibition which is relied on as taking the case out of the employment, that contravention was of such a nature as to take the case out of s. 1, sub-s. 1, of the Act, and that for the determination of that question the cases before the amending Act, such as *Plumb* v. *Cobden Flour Mills Co.* (1), embodying the tests of "prohibited territory" or "added peril," are still to be applied. To apply that ruling to such a case is in my judgment contrary to sub-s. 2 and to the decision of this House in the contrasted cases of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2) and *M'Aulay* v. *James Dunlop & Co.* (2) Sub-s. 2 excludes any such question of fact: the word "deemed" quite clearly substitutes for any such question a conclusion of law: it cannot be construed as meaning "shall be deemed to arise, etc.," "provided the arbitrator does not come to a contrary finding of fact."

M'Aulay's case (2), in which the claim failed, was distinguished by this House from *M'Ferrin's* case (2) on the ground that M'Aulay had not merely infringed a prohibition but had trespassed outside the sphere of his work as a miner and had taken upon himself the work of an entirely different employment, that of a fireman. Lord Dunedin said (3): "I read the Explosives Order, not in the sense of finding in it a prohibition, but as defining the duties of the fireman. These are the special duties of the skilled man, and undoubtedly the deceased man was not engaged to perform these duties. He was not a fireman, and was not qualified to undertake a fireman's duty." Lord Dunedin is there careful to emphasize the marked and deliberate departure from the man's scope of employment into an employment of an entirely different category which must have taken place if the man is not to have the benefit of sub-s. 2. His language is in sharp contrast with what he said earlier in

(1) [1914] A. C. 62.
(2) [1926] A. C. 377.
(3) [1926] A. C. 390.

these cases in reference to *M'Ferrin's* case as quoted above. He sums up the distinction thus (1): "It is not that there is a specific prohibition; it is that it is not his employment which he was engaged in."

Such a question cannot arise in the present case, where there is a finding that though the workman contravened the prohibition he did so in the course of doing the job for which he was employed, though no doubt under the unamended Act his contravention would have taken the case outside the statute. It was indeed submitted in argument before your Lordships that sub-s. 2 is self-contained in regard to the sphere of employment, so that if its precise conditions are fulfilled the matter is ipso facto concluded as a question of law and hence no further question arises in regard to satisfying s. 1, sub-s. 1. I think the decision of this House in *M'Aulay's* case (2) precludes this contention; but in any case, in my opinion, the precise conditions required by Lord Dunedin before any question of fact can be entertained to restrict the remedial operation of sub-s. 2 must be strictly observed: hence no question can arise of the case being excluded under sub-s. 1 on the ground of breach of prohibition; it must be found that the man had actually deserted the task for which he was paid in order to do some one else's work of a different category. He must be found to have changed his employment, not in the artificial sense of contravening a regulation and thereby taking an unnecessary risk, but in the ordinary and everyday sense in which a man is said to be doing another job, as illustrated by *M'Aulay's* case. (2)

I have not so far dealt with the latter part of the learned county court judge's judgment or the reasoning which led him to feel that he was bound to hold as a conclusion of law that the accident did not arise out of Thomas's employment.

I think he has done so because he has misapprehended the effect of *Stephen* v. *Cooper* (3), and has treated that case as an authority on the interpretation of sub-s. 2, whereas in that case no question under sub-s. 2 arose at all. The findings of the arbitrator were stated by Lord Hailsham L.C. (1) as amounting to findings that the accident was caused solely by the man's foolhardy act of bravado. The House simply applied to these findings (which were perhaps somewhat harsh to the man) the rules laid down in cases like *Plumb* v. *Cobden Flour Mills Co.* (2) and *Lancashire and Yorkshire Ry. Co.* v. *Highley* (3) to the effect that "added peril" or "enhanced risk" due to the man's own conduct took the case out of the Act: the remedial provision of sub-s. 2 was not in question and had no application to the case. It was, however, argued before your Lordships on the authority of *Stephen* v. *Cooper* (4) that in the present case, though the conditions of sub-s. 2 were fulfilled, the matter could still be envisaged from the standpoint that the infringement of the prohibition "added a peril" and this "added peril" took the case out of the employment and barred the claim notwithstanding sub-s. 2. Such an argument attempts to create a notional dissection of the single act from which the accident resulted. It is, however, only one act that caused the accident. That act cannot be split up into two aspects so that though it falls within sub-s. 2 as a breach of a prohibition it falls outside sub-s. 1 as an "added peril." Since a breach of prohibition must almost invariably involve an enhancement of risk, the contention would in effect nullify any remedial effect of sub-s. 2. But the argument completely fails, I think, on the sole ground that, for the reasons I have already stated, the express words of sub-s. 2 (once the conditions of the sub-section are fulfilled) must override and exclude any test or formula such as that of "added peril." I think the actual conclusion of the learned county court judge is based on an erroneous understanding of law.

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(1) [1926] A. C. 387.

(2) Ibid. 380.

(3) [1929] A. C. 570.

I think the appeal should be allowed.

(1) [1929] A. C. 573.
(2) [1914] A. C. 62.
(3) [1917] A. C. 352.
(4) [1929] A. C. 570.

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Order of the Court of Appeal reversed. Judgment entered for the appellant; the respondents to pay the appellant her costs here and below.

Lords' Journals, November 15, 1932.

Solicitors for the appellant: *Smith, Rundell, Dods & Bockett.*

Solicitors for the respondents: *Bell, Brodrick & Gray.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
Nov. 15.

WESTMINSTER BANK, LIMITED . . . APPELLANTS;

AND

OSLER (INSPECTOR OF TAXES) . . . . RESPONDENT.

Revenue—Income Tax—Bank's Investment in War Bonds—Conversion into War Loan—Profit on Conversion—Realization of Investments—Taxable Profit—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

Bankers who held large sums invested in National War Bonds having, in answer to an offer by the Lords Commissioners of His Majesty's Treasury, exchanged their National War Bonds as to part for 5*l.* per cent. War Loan, 1929–1947, at the rate of 100*l.* of War Loan for 95*l.* nominal value of War Bonds surrendered and as to other part into 3*l.* 10*s.* per cent. Conversion Loan at the rate of 134*l.* Conversion Loan for each 100*l.* nominal value of National War Bonds, and having thereby increased the value of their invested funds by a sum of 144,750*l.*:—

Held, chargeable with income tax upon that sum under Sch. D, Case I., of the Income Tax Act, 1918, as upon a taxable profit.

Royal Insurance Co. v. *Stephen* (1928) 14 Tax Cas. 22 approved.

Order of the Court of Appeal [1932] 1 K. B. 668 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. who had dismissed an appeal by the Westminster Bank upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts pursuant to s. 149 of the Income Tax Act, 1918.

The question raised by the appeal was whether, upon the surrender of certain 5*l.* per cent. National War Bonds in exchange for 3*l.* 10*s.* per cent. Conversion Loan and 5*l.* per cent. War Loan, 1929–1947, the Bank had made a taxable profit.

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* *Present*: LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(1) [1932] 1 K. B. 668.

It was common ground between the parties that in the course of their business the Bank had occasion to make large investments, which varied from time to time. For the purposes of income tax they admitted that any profit made by them on the realization of an investment is part of their profits, and the respondent admitted that any loss on realization would properly be deducted in computing the profits. The following is a summary of the facts, which are very fully stated in the report of the case in the Court of Appeal.

The National War Bonds were issued by the Governor and Company of the Bank of England at various dates between September, 1917, and October, 1918, under the authority of the Lords Commissioners of His Majesty's Treasury upon the terms that holders of the bonds might convert their holdings on various dates into 5*l.* per cent. War Loan, 1929–1947, at the rate of 100*l.* 5*l.* per cent. War Loan for each 95*l.* nominal value of 5*l.* per cent. National War Bonds surrendered; or into 3*l.* 10*s.* per cent. Conversion Loan at the rate of 134*l.* 3*l.* 10*s.* per cent. Conversion Loan for each 100*l.* nominal value of 5*l.* per cent. National War Bonds surrendered.

On April 21, 1922, before any of the bonds were repayable, the Lords Commissioners issued an "offer of conversion to holders of 5*l.* per cent. National War Bonds," which contained the following words: "Holders of the above Bonds may surrender their holdings in whole or in part and receive in exchange therefor . . . . 3*l.* 10*s.* per cent. Conversion Loan at the rate of 134*l.* 3*l.* 10*s.* per cent. Conversion Loan for each 100*l.* nominal of 5*l.* per cent. National War Bonds surrendered" . . . .

In response to this offer the Bank on May 6, 1922, surrendered holdings of 4,000,000*l.* and 2,205,000*l.* National War Bonds in exchange for 8,314,700*l.* 3*l.* 10*s.* per cent. Conversion Loan. Subsequently in June and October on the terms of the original offer they exchanged their remaining holdings of the bonds into 5*l.* per cent. War Loan, 1929–1947, and received 1,368,421*l.* 5*l.* per cent. War Loan for 1,300,000*l.* National War Bonds.

The Bank in their own books of account carried forward the new stocks at the price at which the National War Bonds appeared, that is at the original cost of the bonds, and the books showed no profit as arising from the conversion. It was admitted, however, that the value of the new stocks was greater than the original cost of the bonds.

The Bank were assessed to income tax in respect of the profits of their trade under Schedule D of the Income Tax Act, 1918, for the three years ending on April 5 in 1924, 1925, and 1926 respectively and, in estimating the profits, the excess value of the new stocks received in exchange for the National War Bonds was taken into account. It was agreed that the excess value, if properly included, was 141,750*l.*

The Bank appealed against the assessments. The appeal was heard on October 23, 1929, by the Commissioners for the Special Purposes of the Income Tax Acts. The Bank contended that no taxable profit had been realized by the conversion. The inspector of taxes contended that on the occasion of each conversion the Bank had realized the National War Bonds and, by receiving in exchange investments of greater value, had made a profit. The Commissioners dismissed the appeal and decided that the conversion of National War Bonds into 3*l.* 10*s.* per cent. Conversion Loan must be regarded as the making of a new bargain and, following *Royal Insurance Co.* v. *Stephen* (1), held that income tax was chargeable. They also held that they could not distinguish for taxation purposes between the conversion into 5*l.* per cent. War Loan and the conversion into 3*l.* 10*s.* per cent. Conversion Loan.

The Bank then required the Commissioners to state a case for the opinion of the High Court, and a case was duly stated setting out the facts related above, upon the hearing of which Rowlatt J. followed his former decision in *Royal Insurance Co.* v. *Stephen* (1), and affirmed the decision of the Commissioners.

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(1) (1928) 14 Tax Cas. 22.

The Bank then appealed to the Court of Appeal, and that Court (Lord Hanworth M.R., Greer and Romer L.JJ.) affirmed the decision of Rowlatt J. [1932] 1 K. B. 668.

The Bank appealed.

Nov. 3. *Wilfrid A. Greene K.C.* and *J. S. Scrimgeour* for the appellants. Profit is not taxable until it is realized: *Northern Assurance Co.* v. *Russell* (1); *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (2); *Scottish Investment Trust Co.* v. *Forbes.* (3) "It is quite a well-settled principle in dealing with questions of assessment to income tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than that for which he originally acquired it, the enhanced price is not profit in the sense of Sch. D of the Income Tax Act of 1842 and therefore is not assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but is an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for income tax. What is the line which separates the two classes of cases it may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made by an operation of business in carrying out a scheme for profit-making": per Lord Justice-Clerk (Sir J. H. A. Macdonald), *Californian Copper Syndicate* v. *Harris.* (4)

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(1) (1889) 2 Tax Cas. 571, 578.

(2) [1914] A. C. 1001, 1011.

(3) (1893) 3 Tax Cas. 231.

(4) (1904) 6 F. 894, 897; 5 Tax Cas. 159, 165.

That passage states the principle. To give an example: If the stock in trade of a merchant increases in value, perhaps because the public have taken a fancy to his goods, he is not chargeable to income tax on the enhanced value of his stock. That is a profit in one sense, but it is not a taxable profit. Again, the merchant's stock in trade may rise in value as the result of his own efforts; he may sell an article, and with the proceeds of the sale purchase another which he considers more valuable. If he is right in so thinking, and if he puts the newly bought article into his stock, the result is that he has increased the value of his stock. He is not to be treated as having made a taxable profit. That event happens when he finally sells part of his stock and takes his profit. In the case supposed he has not yet done this. The transaction is to be referred to capital and not to revenue. The same considerations apply to the present case. The appellants in surrendering their War Bonds for Conversion Loan and War Loan have gone through the same process as the hypothetical merchant. They have replaced part of their capital, which is their stock in trade, by other stock; which indeed has proved to be more valuable, but that merely means that their stock in trade has increased in value. Indeed the principle applies a fortiori to the case of a banker, for bankers as such do not make a business of earning a profit by buying at one price and selling at another or of manufacturing goods and selling them at a price to cover cost and profit. A banker's profit, for the purposes of this case, comes from the income of his investments. That which is the whole purpose and object of a merchant—namely, to sell his stock at a profit, a banker may never do at all.

The error which has affected the judgments of the Courts below has arisen from not distinguishing sales by a merchant for the purpose of capital from sales for the purpose of revenue or profit, and so confusing the one with the other and then introducing the confusion into the present case. If a dealer in works of art having a cabinet among his stock in trade, and becoming aware of a picture which is on offer at a price which he believes to be less than its value, decides to sell the cabinet and sells it at a price higher than that which he gave for it, and with the proceeds buys the picture, this is all one and the same capital transaction. There appears to be a profit on the sale of the cabinet, but the appearance is not of the essence of the transaction. The critical question is whether the newly purchased article is placed or kept in stock or whether it is taken out of stock. If instead of buying the picture the art dealer had bought a motor-car for his private use, there would probably have been a taxable profit, but in acquiring one object of art in substitution for another or, in the words of Lord Trayner (1), in merely changing the investment of capital to pecuniary advantage, there is no taxable profit, for exchange is not realization and a tradesman is not taxed on appreciation of his stock.

Moreover this false attribution of capital to profits is shown by the methods which have to be resorted to in order to quantify the amount of the so-called profit. The cost of the National War Bonds is first taken; against that is put, not any fixed figure, such as the price at which the bonds had been sold (if this had happened), but the market price of the War Loan, in other words, the estimated value of the War Loan; but estimated value or value in the market is not to be considered in calculating profit for the purpose of taxation; if it were, there could be no certainty from day to day of the amount of a taxpayer's liability.

Reliance was placed by Romer L.J. in the Court of Appeal on *Brown* v. *National Provident Institution* (2), but in truth that case has no bearing upon the question raised on this appeal. The appellant in that case had bought Treasury bills; some he sold before and some after maturity; others were after maturity converted into 5*l.* per cent. War Loan. The question was whether he had made a profit on discounts within the meaning of Sch. D, Case 3, of the Income Tax Act, 1842, s. 100. The point that the conversion into War Loan was merely a change in a capital investment did not arise.

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(1) 6 F. 899; 5 Tax Cas. 167.

(2) [1921] 2 A. C. 222; 8 Tax Cas. 57.

The Court of Appeal have approved and followed the decision of Rowlatt J. in *Royal Insurance Co.* v. *Stephen.* (1) In that case the Insurance Company held large investments in the stocks of various railway companies. By the Railways Act, 1921, the railways of Great Britain were amalgamated into four groups, and stock holders in the old companies had to exchange their holdings for stock of the group containing the company in which the stock had been held. It was found in the special case stated by the Commissioners for the Special Purposes of the Income Tax Acts that the various stocks received by the Insurance Company in exchange for the stocks held by them in the old companies "had a definite market value on the date of the exchange," and this was in fact less than the original cost to that company of the old stocks. Rowlatt J. held that the Insurance Company were entitled to set off against their profits the loss they had sustained on the compulsory exchange. The Court of Appeal have applied that decision to the solution of the present case; but there again the question whether the loss was to be attributed to capital or to revenue was not raised. Neither *Brown* v. *National Provident Institution* (2) nor *Royal Insurance Co.* v. *Stephen* (1) touches or affects the present case.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondent. The analogy of the dealer in works of art is not a true analogy, because the value of the newly purchased article is uncertain while the value of War Loan varies so little as to be fixed for practical purposes. But even if it be a true analogy it does not help the appellants. It is not the fact that, when a merchant sells part of his stock in trade and replaces it by another article he makes no profit or loss, as the case may be. If he sells an article at less than the price he gave for it he makes a loss, as the Insurance Company did in *Royal Insurance Co.* v. *Stephen* (1); and if he sells an article at a price higher than that which he gave for it, he makes a profit. If he chooses to invest his profit in the purchase of another article, that does not alter the fact that he has made a profit.

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(1) 14 Tax Cas. 22.

(2) [1921] 2 A. C. 222; 8 Tax Cas. 57.

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That which can be done through the medium of a purchase and sale can be done by means of an exchange: see per Warrington L.J., *National Provident Institution* v. *Brown.* (1) In short realization includes exchange, and the profit may be either in the form of money or in the form of money's worth.

Wilfrid A. Greene K.C. replied.

The House took time for consideration.

Nov. 15. LORD BUCKMASTER. My Lords, the appellants are the Westminster Bank, Ld., who have occasion while carrying on their business to make, and from time to time to vary, large investments. It is not disputed that any profit made by them on the realization of an investment is part of the profits of their trade for the purposes of income tax; the question on this appeal is whether in the circumstances I will state such profit has been made.

During the years 1917 and 1918 the appellants obtained the following holdings of National War Bonds:—

Amount.	Series.	Date of Issue.	Date when repayable.	Price at which repayable.
4,000,000*l.*	1st	October, 1917	Oct. 1, 1922	102*l.*
250,000*l.*	2nd	April, 1918	April 1, 1923	102*l.*
2,205,000*l.*	2nd	April, 1918	April 1, 1923	102*l.*
1,050,000*l.*	3rd	September, 1918	Sept. 1, 1923	102*l.*

The prospectus that was issued inviting application for the bonds contained a provision entitling the holders to convert the bonds into 5 per cent. War Loan 1929–47 at the rate of 100*l.* of that Loan for 95*l.* nominal of the value of the surrendered War Bonds.

On April 21, 1922, the Treasury made an offer to the holders of all the above bonds entitling them to surrender their holdings in exchange for 134*l.* 3½ per cent. Conversion Loan for each 100*l.* 5 per cent. National War Bonds. In response to this offer, the appellants surrendered their holdings of four million of the first series, and 2,205,000*l.* of the second series, and subsequently, in exercise of their rights under the terms of the original issue, exchanged their remaining holdings into the 5 per cent. War Loan.

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(1) [1920] 3 K. B. 35, 55.

If such transactions be accepted as the equivalent of the realization of the original holdings, it is agreed that the profit or excess value would amount to 141,750*l.*, and it was sought on behalf of the Inland Revenue to bring this sum into the account in determining the profits of the appellants' trade for purposes of income tax under cl. 1 of Schedule D. The Bank contended that there had in fact been no realization of profit, and that there was a mere accretion of capital value which could not be brought into account until in fact it had been realized.

The Commissioners decided against this contention, and their opinion has been supported, though with some hesitation, by Rowlatt J. and the Court of Appeal.

On behalf of the appellants it was plausibly argued before the House that the nature of this transaction was equivalent to the mere exchange of an item in the stock in trade of a trader, in which case it was contended that unless an item so taken in exchange was sold, or taken out of the business, no tax would be exigible by reason of the fact that the article taken in exchange was of greater value than that for which it was bartered.

I appreciate the strength of this argument, and I am not surprised at the perplexity in which the judges have found themselves; but the wholly different character of the businesses, the uncertainty of values in dealing with a trader's stock, and the probability that articles exchanged in the way of trade would prima facie be of equal commercial value render the analogy unsound. The exchange effected in the present case was in fact the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security. The investment represented by the original War Bonds came to an end as soon as the new securities were taken in its place, when a new venture was begun in relation to the new holding, and the fact that this transformation took place by the process of exchange does not in my opinion avoid the conclusion that there has been what is described as a realization of the security. This view is, I think, supported by the authority of this House.

In *Brown's* case (1) a discounting firm had bought Treasury Bills ; some had been sold, some discounted, and others before maturity had been exchanged for War Loan under an offer then made by the Government. It was held that the profit obtained by such exchange was equivalent to the discount value that had accrued since the original issue.

It is perfectly true, as was pointed out, that the liability of discounts to tax is under a special head by itself, Case III., r. 1 (*b*) ; but Warrington L.J., in giving judgment in the Court of Appeal (2), stated, with regard to this conversion, that it was simply a sale on certain terms fixed by the Government and investment of the proceeds, and this expression of opinion was approved in terms in this House. But from this it follows that the process of exchange of one security for another in such circumstances is the equivalent of a sale or realization and a reinvestment, and this principle must apply whether the purpose of its application is the determining the amount of accrued discount or the profit made by the original investment.

The case of *Californian Copper Syndicate* (3), although again the facts are different, accepts the same principle. In that case a company formed to deal in mining properties, sold property for fully paid shares in another company, and Lord Trayner stated that the profit was realized and that the price was shares, and adds that though there could be no realized profit except when paid in cash, the shares were realizable and could have been turned into cash. And Lord Dunedin, in *Commissioner of Taxes* v. *Melbourne Trust, Ld.* (4), approves of this principle, and states that enhanced values may be assessable where what is done is not merely a realization or change of investment, but an act in the carrying on or carrying out of the business.

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(1) [1921] 2 A. C. 222; 8 Tax Cas. 57.

(2) [1920] 3 K. B. 35, 55.

(3) 6 F. 894; 5 Tax Cas. 159.

(4) [1914] A. C. 1001.

Finally, the case of the *Royal Insurance Co.* v. *Stephen* (1) is in my opinion indistinguishable from the present. There a railway company was required under the Railways Act of 1921 to accept new stocks in the amalgamated companies in exchange for the stock held in the companies which were absorbed. A loss having arisen to a company by virtue of this arrangement, it was claimed that the company was entitled to deduct this loss in making their returns, and the claim was upheld by Rowlatt J. That case was decided some three or four years ago, and it has not been questioned, and indeed, upon the basis that it was accurate, the Finance Act of 1931 expressly provided that it should not apply to future exchanges that were then contemplated.

It is not, in my opinion, necessary for this decision to rely upon the fact that legislation has been passed upon the hypothesis that the decision in the *Royal Insurance Co.* v. *Stephen* (1) was right, for, in my opinion, the view upon which that legislation was based was, for the reason that I have given, accurate, and there is no need to consider its effect upon the present case.

For this reason I am of opinion that the appeal must fail and that the Bank must pay the income tax.

LORD BLANESBURGH. My Lords, I agree.

LORD WARRINGTON OF CLYFFE. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur.

LORD WRIGHT. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 15, 1932.

Solicitors for appellants: *Travers-Smith, Braithwaite & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

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(1) 14 Tax Cas. 22.

[HOUSE OF LORDS.]

H. L. (E.)*
1932
Nov. 15.

RUSTON AND HORNSBY, LIMITED . APPELLANTS ;

AND

GOODMAN . . . . RESPONDENT.

Workmen's Compensation—Partial Incapacity—Inability to obtain Work—Incapacity treated as total—Award of Compensation—Cesser on Receipt of Unemployment Benefit—Past Receipt of Benefit—Form and Effect of Award.

By s. 16 of the Workmen's Compensation Act, 1923 (1): " If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order. . . . . Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit."

Held, that, in an application by a workman for an award that his partial incapacity may be treated as total, the above section does not impose upon the county court judge making such an order any obligation to make it subject to a condition that the applicant shall give credit for unemployment benefit already received.

Order of the Court of Appeal [1932] 2 K. B. 60 affirmed.

APPEAL from an order of the Court of Appeal (2) dismissing an appeal from an award of the judge of the County Court of Lincolnshire holden at Lincoln and Horncastle in favour of the respondent under s. 16 of the Workmen's Compensation Act, 1923. (3)

The appellants are a firm of engineers carrying on business in Lincoln. The respondent was a fitter in their employment. On November 21, 1923, while he was in the course of his employment a crane wire broke and one of the blocks fell

* *Present :* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

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(1) This section was re-enacted as s. 9, sub-s. 4, of the Workmen's Compensation Act, 1925, and enacted in an amended form but with the same proviso in the Workmen's Compensation Act, 1931.

(2) [1932] 2 K. B. 60.

(3) See headnote.

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upon his right hand and seriously and permanently injured it. On February 28, 1924, he offered to return to work and was taken back, and worked for the appellants until January, 1930, and then for their successors as an inspector at an increased wage until October 10, 1931, when his employers were obliged to discharge him owing to depression in trade. He applied for employment elsewhere but was unable to obtain it owing to the injury to his hand. In January, 1932, he was receiving unemployment benefit.

On January 15, 1932, the respondent applied to the county court for an award of compensation at the full rate of 1*l.* 15*s.* a week from October 10, 1931, until payment. The county court judge heard the application on February 15, 1932, and found that the respondent was partially incapacitated and had so far recovered from his injury as to be fit for employment of a certain kind; that he had taken all reasonable steps to obtain, and had failed to obtain, employment, and that his failure to obtain employment was mainly due to the injury. He therefore awarded compensation on the basis of the respondent's total incapacity from October 10, 1931, and ordered that the appellants should pay the respondent the weekly sum of 1*l.* 15*s.* as compensation for the personal injury caused to him, such weekly payment to commence from October 10, 1931, and to continue during the total or partial incapacity of the respondent, or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Act. When asked to impose a condition that the respondent should repay or give credit for the amount received by him by way of unemployment benefit before the date of the order, the learned county court judge added: " My order is only made on this date "—February 15—" and I consider that the Act only enables me to attach such a condition for the future and not to apply to the past I attach the condition as directed by the Act, but I refuse to make any condition having retrospective effect."

The employers appealed from this order. The Court of Appeal (Lord Hanworth M.R. and Greer and Romer L.JJ.) affirmed the order. Hence this appeal.

Nov. 14. *Derbyshire K.C.* and *J. Alun Pugh* for the appellants. The arguments of counsel for the appellants appear in the speech of Lord Buckmaster.

E. W. Cave K.C. and *Richard Elwes* for the respondent.

Nov. 15. At the conclusion of the argument on behalf of the appellants, counsel for the respondent being present but not called upon, their Lordships delivered judgment as follows :—

Lord Buckmaster. My Lords, John Goodman, the respondent in this case, was a workman in the employment of the appellants, who carry on business at Lincoln. He was a fitter, and in the course of his work a block of metal fell upon his hand and seriously injured it. This accident took place on November 21, 1923, and on February 28, 1924, he offered himself for resumed labour, was accepted, and continued to work with the appellants' firm or their successors until October 10, 1931. During the latter part of the time he was advanced to the position of foreman with an increase of wage. In October, 1931, owing to trade depression, his employers were bound to limit their staff, and the respondent was discharged. He applied for work elsewhere and was definitely refused because of the permanent injury that his hand had sustained. He then applied for compensation under the Workmen's Compensation Act, and on February 15, 1932, an award was made in his favour awarding him 35*s.* a week on the ground of total incapacity, from October 10, 1931. Now between October 10, 1931, and February 15, 1932, he had been receiving, as he was fully entitled to do, unemployment pay under the Unemployment Insurance Act. No complaint can be made against the man for having done that ; he could not tell what the result of an arbitration might be, or what the future might hold for him, and he had rights in respect of unemployment relief which he was entitled to enjoy.

The question which has arisen is this : The award that was made simply awarded him this sum that I have mentioned and made no condition dependent on the fact that he had been

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receiving unemployment benefit. The real complaint here is that the arbitrator ought to have made as part of his order a provision that the unemployment benefit disentitled the man, to the extent of the benefit that he received, from receiving the compensation which he had awarded. This question involves the construction of s. 16 of the Workmen's Compensation Act, 1923, which is in these terms: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of the principal Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by paragraph 16 of the First Schedule to the principal Act." And then the section contains this proviso: "Provided that every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit." The real argument that has been advanced before the Court of Appeal and before this House is that the effect of that provision is that the arbitrator is under compulsion to provide that neither antecedently nor subsequently shall the man be receiving at one and the same time unemployment benefit and the compensation that is awarded.

To my mind the complete answer to that argument lies in the words of the provision itself. It is unnecessary to emphasize again the fact that it is the business of this House to administer the law and not to amend or express opinions about the wisdom of Acts of Parliament. If the words of a statute are obscure and ambiguous then the House is bound to consider which is the most rational view of their construction in order to determine what might be assumed to have been intended; but if the words are unambiguous and plain it is no part of the duty of this House to say: "The result of this is something which we do not regard as reasonable and

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therefore we shall try to give it some other interpretation." The words of this Act of Parliament are plain beyond possibility of doubt. The order is to be made subject to a condition that it shall cease to be in force if the workman receives unemployment benefit, that is to say, the order that has once been made shall become inoperative if the workman receives unemployment benefit. It clearly points to the happening of a future event, and cannot possibly be made to agree with something that had happened before the order was made. There is nothing in that provision to compel the arbitrator to impose conditions with regard to the receipt of past unemployment pay. Whether within his discretion he might do so and might so adjust the payment in relation to what had been received as to keep it at a level throughout is not a matter which is before this House. The only point we have to consider is the construction of the statute.

My Lords, I am anxious as far as possible to avoid embarking on any questions other than those that have expressly been brought before this House for consideration. The Act itself is full of immeasurable possibilities of doubt, and it is not desirable that they should be unnecessarily raised where they have not been argued throughout the earlier stages of the proceedings. The only reasons urged here by the appellants were: "(1.) Because s. 16 of the Workmen's Compensation Act, 1923, is clearly intended to provide that no partially incapacitated workman shall in respect of one and the same period of time receive both unemployment benefit and the additional compensation;" to which the answer is: It did so intend, but only after the order was made. Secondly, because there is no provision in the Workmen's Compensation Act for the recovery of unemployment benefit; whether that be so or not is not a matter than can affect the construction of the statute; and, finally, "Because there is neither expressed nor implied in s. 16 of the Workmen's Compensation Act, 1923, an unlimited or any discretion in an arbitrator to attach or to refuse to attach such conditions to his order as he may think fit with regard to the recovery or repayment of unemployment benefit." With regard to the future this is certainly true, but the section does not affect discretion as to the past.

In my opinion, the question raised for our decision here must be determined by the actual words of the provision itself, and those words, as I have pointed out, apply and can only apply to something that is to happen in the future, and can have no relation to something that has happened in the past.

LORD BLANESBURGH. My Lords, I agree.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD WRIGHT. My Lords, I agree.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, November 15, 1932.

Solicitors for appellants: *Waterhouse & Co., for Andrew, Race, Midgley & Hill, Lincoln.*

Solicitors for respondent: *Church, Adams, Tatham & Co., for J. B. Anderson & Co., Nottingham.*

[PRIVY COUNCIL.]

J. C.*
1932
July 28.

CROFT . . . . APPELLANT;

AND

DUNPHY . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Scope of Authority—Customs Duties—Anti-smuggling Provisions—Extra-territorial Operation—Seizure of Canadian Vessel and Cargo—Customs Act (*R. S. Can.*, 1927, *c.* 42), *ss.* 151, 207 *—British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91.

If a matter is within the legislative authority of the Parliament of Canada under s. 91 of the British North America Act, 1867, the permitted legislation is not limited by any other consideration than is applicable to the legislation of a sovereign State. The authority so conferred upon that Parliament in relation to customs duties extends to enacting anti-smuggling provisions similar in scope to the provisions, operating beyond territorial limits, which had long formed part of Imperial customs legislation, and presumably were regarded as necessary for its efficacy.

Consequently, the Parliament of Canada was competent to provide by ss. 151 and 207 of the Customs Act (R. S. Can., 1927, c. 42, as amended in 1928) that if any vessel registered in Canada was hovering within twelve miles of the Canadian coast, having on board dutiable goods, the vessel and her cargo were to be seized and forfeited.

It was not necessary to determine whether s. 3 of the Statute of Westminster, 1931, by which "it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial effect," was retrospective.

Judgment of the Supreme Court of Canada [1931] S. C. R. 531 reversed.

APPEAL (No. 131 of 1931) by special leave from a judgment of the Supreme Court of Canada (June 30, 1931) reversing a judgment of the Supreme Court of Nova Scotia in banco (May 30, 1930) which affirmed a judgment of Paton J. of that Court.

The respondent's schooner, which was registered in Nova Scotia (where also he resided) together with her cargo, consisting of dutiable goods belonging to the respondent, was seized by the Canadian customs authorities on June 13, 1929, while the vessel was off the coast of Nova Scotia. The seizure was made under ss. 151 and 207 of the Customs Act (R. S. Can., 1927, c. 42, as amended by c. 16 of the Statutes of 1928); the provisions in question appear from the judgment of the Judicial Committee.

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* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

The respondent brought an action in the Supreme Court of Nova Scotia against the appellant, the officer of the customs who effected the seizure, alleging that the seizure was illegal and claiming the return of the vessel and cargo, or alternatively their value, and damages for detention.

It was found, and was not contested upon the present appeal or in the Supreme Court of Canada, that the vessel when seized was "hovering" within twelve miles of the coast of Canada.

The Supreme Court of Canada by a majority consisting of Duff and Lamont JJ. (with whose judgment Rinfret J. concurred) held that the legislation was ultra vires having regard to its extra-territorial effect. Newcombe J. (with whose judgment Cannon J. concurred) dissented, holding that the legislation, in its application to the facts of the case, was valid. The appeal is reported at [1931] S. C. R. 531.

1932. July 5, 7, 8. *J. M. Stewart K.C.* and *Frank Gahan* for the appellant. The provisions of the Customs Act relevant to the seizure were intra vires under s. 91 of the British North America Act, 1867, as being for the peace, order, and good government of Canada; the authority was implicit under head 2 (the regulation of trade and commerce) and head 3 (taxation). Both the vessel and her cargo were Canadian. It is clear that the Dominion Parliament had full power to make laws in relation to customs duties, and it is submitted that the authority extended to the provisions in question in this case, as being necessary to make effective legislation on that subject. Before 1867 there had been in the United Kingdom a series of enactments directed against smuggling known as the "Hovering Acts," and operating beyond territorial limits. Provisions of that nature appear in ss. 212 and 217 of the Customs Consolidation Act, 1853, showing that they were treated as part of customs legislation and necessary to it being effective. When in 1867 authority was given to the Dominion Parliament to legislate as to customs the power to enact similar provisions was impliedly included. The authority of the Dominion Parliament under the Act of 1867 to make laws for the peace, order and good government of Canada is not limited territorially save so far as that appears from the Act. The words " of Canada " impose a territorial restriction as to certain classes of subjects. In many cases, however, the powers under s. 91 are not so restricted. Under head 4 loans can be, and are, floated in London and New York. Under head 5 postal services beyond territorial limits are in operation. Under head 7 the power as to military and naval services is not confined to Canada : see Military Service Act, 1917, ss. 2, 4, 13, and War Appropriation Act, 1918, s. 2. Under head 8 the High Commissioner and his staff are maintained in London. The Judicial Committee has frequently laid down that the legislative powers conferred by the Act of 1867 are plenary powers as large and of the same nature as those of the Imperial Parliament : *The Queen* v. *Burah* (1) ; *Hodge* v. *The Queen* (2) ; *Powell* v. *Apollo Candle Co.* (3) ; *Riel* v. *The Queen* (4) ; *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada.* (5) A provision necessary to the efficacy of authorized legislation is not ultra vires although its operation may be extra-territorial : *Att.-Gen. for Canada* v. *Cain.* (6) The decision in *Macleod* v. *Att.-Gen. for New South Wales* (7) was as to the true construction of the enactment in question ; the observations towards the end of the judgment as to the territorial restriction of legislative powers were obiter. In any case they should be read in relation to the criminal legislation there in question ; they were referred to in the judgment in *Cain's* case. (6) [Reference was made also to *The Ship " North "* v. *The King* (8) ; *Ashbury* v. *Ellis* (9) ; *In re Criminal Code* (10) ; *Rex* v. *Brinkley* (11) ; *Peninsular*

(1) (1878) 3 App. Cas. 889, 904.
(2) (1883) 9 App. Cas. 117, 131.
(3) (1885) 10 App. Cas. 282, 289.
(4) (1885) 10 App. Cas. 675, 678.
(5) [1912] A. C. 571, 581.
(6) [1906] A. C. 542.
(7) [1891] A. C. 455.
(8) (1906) 37 Can. S. C. R. 385.
(9) [1893] A. C. 339.
(10) (1897) 27 Can. S. C. R. 461.
(11) (1907) 14 Ont. L. R. 434.

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& Oriental Steam Navigation Co. v. *Kingston* (1); and *Case of Leonard Watson.* (2)] Sect. 151, sub-s. 7, of the Customs Act in stating the meaning of " territorial waters of Canada " for the purposes of ss. 151 and 207 was not repugnant to the Territorial Waters Jurisdiction Act, 1878, s. 7, having regard to the terms of that section. Further, by the Statute of Westminster, 1931, " it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation " ; having regard to the terms of the section it has retrospective effect.

D. A. Cameron K.C. and *Horace Douglas* for the respondent. The Parliament of Canada being a subordinate legislature, in the sense that its authority is derived, its power to make laws for the peace, order, and good government of Canada, prima facie at least, is restricted territorially : *Macleod* v. *Att.-Gen. for New South Wales.* (3) A comparison of that case with *The Trial of Earl Russell* (4) shows the distinction between the power of the Imperial Parliament and that of a subordinate legislature. In *Macleod's* case (3) no doubt the legislation in question was of a criminal nature, but here it is penalizing. The restriction applies particularly to laws relating to taxation, as this does : *Commercial Cable Co.* v. *Att.-Gen. of Newfoundland* (5); *Pass* v. *British Tobacco Co. (Australia).* (6) Even if some of the heads of s. 91 of the British North America Act, 1867, appear by necessary intendment to confer extra-territorial power that does not show a similar intention as to laws relating to customs duties. No inference to that effect can properly be drawn from legislation passed in Canada in the exceptional circumstances of the war. The principle of necessary intendment should not readily be applied so as to affect liberty or property : *Fenton* v. *Hampton.* (7) It was not shown that a power to seize Canadian vessels within twelve miles of the coast was necessary to the efficacy of the provisions of the Act. The Act contained in ss. 11 and 203 provisions to prevent and punish smuggling ; if a power of seizure at

(1) [1903] A. C. 471.
(2) (1839) 9 Ad. & E. 731.
(3) [1891] A. C. 455.
(4) [1901] A. C. 446.
(5) [1912] A. C. 820, 826.
(6) (1926) 42 Times L. R. 771.
(7) (1858) 11 Moo. P. C. 347, 360.

sea was necessary it should have been confined to vessels within the three mile limit. Apart from territorial restriction no provision is valid as being ancillary to legislation expressly authorized by the British North America Act, 1867, unless it is necessary to make the legislation effective: it is not sufficient that it is desirable or convenient: *City of Montreal* v. *Montreal Street Ry.* (1); dissenting judgment of Duff J. in *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry., etc., Co.* (2), approved by the Board on appeal. (3) In the absence of materials necessity for efficacy should not be assumed: *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia.* (4)

Sir Thomas Inskip A.-G. (with him *Wilfrid Lewis*) appeared upon notice from the Judicial Committee. He stated that he did not think it necessary to intervene in the appeal, having regard to s. 3 of the Statute of Westminster, 1931, whether or not that section was retrospective in effect.

July 28. The judgment of their Lordships was delivered by

Lord Macmillan. On June 10, 1929, the schooner *Dorothy M. Smart* sailed for " the high seas " from the French island of St. Pierre with a cargo on board of rum and other liquors, which are dutiable under Canadian law. The vessel was registered in Nova Scotia, and with her cargo was the property of the respondent, who is resident in Nova Scotia. On June 13, 1929, the schooner, when at a distance of 11½ miles from the coast of Nova Scotia, was boarded by the appellant, an officer in the Customs service of the Canadian Government. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port.

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 & 19 Geo. 5, c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

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(1) [1912] A. C. 333.

(2) (1913) 48 Can. S. C. R. 98, 122.

(3) [1914] A. C. 1067.

(4) [1930] A. C. 111, 121, 122.

The enactments impugned are contained in ss. 151 and 207 of the statute as amended. Sect. 151 provides as follows: "(1.) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port. . . . . (7.) For the purposes of this section and section two hundred and seven of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Sect. 207 enacts as follows: "(1.) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her . . . . cargo shall be seized and forfeited. . . . . "

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of twelve miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the Customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five judges of the Supreme Court of Nova Scotia en banco. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Duff, Rinfret and Lamont JJ., Newcombe and Cannon JJ. dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in *The Le Louis* (1): " Maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination." This special latitude of legislation in such matters is a familiar topic in the text-books on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265 that a state in matters of revenue and health " exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports." In Halleck's " International Law," 4th ed., vol. i., p. 168, it is pointed out that beyond the generally accepted limits of territorial waters " states may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent ' hovering on their coasts.' " Again, in Hall's " Foreign Powers and Jurisdiction of the

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(1) (1817) 2 Dod. Adm. 210, 245.

British Crown," it is stated in para. 108, p. 244, that "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested." Without further multiplying quotations it may be sufficient to add references to Phillimore's "International Law," vol. i., para. 198, and Wheaton's "International Law," 6th ed., vol. i., p. 367.

But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.

In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canad or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

In the well-known case of *The Queen* v. *Burah* (1) Lord Selborne, in expressing the views of the Board in the comparable instance of India, uses this very significant language: "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those

(1) 3 App. Cas. 889.

of Parliament itself." Again, speaking of the Provincial legislature of Ontario, Sir Barnes Peacock, in giving the judgment of this Board in *Hodge* v. *The Queen* (1), said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow." To the Dominion Parliament these words apply a fortiori, with the substitution of s. 91 for s. 92. Their Lordships also recall the language used by Lord Halsbury L.C. in expressing the views of the Board on the power of the Dominion Parliament to legislate for the peace, order and good government of Canada, in the case of *Riel* v. *The Queen*. (2) "The words of the statute," said his Lordship, "are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires: per Lord Justice-General Dunedin in *Mortensen* v. *Peters*. (3) It may be that legislation of the Dominion Parliament may be challenged as ultra vires on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. The question is a domestic one between the Imperial Parliament and the Dominion Parliament.

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(1) 9 App. Cas. 117, 132.

(2) 10 App. Cas. 675, 678.

(3) (1906) 8 F. (J. C.) 93, 101.

When in the course of the hearing it became clear that this was the nature of the controversy, their Lordships deemed it proper that intimation should be made to His Majesty's Attorney-General in order that he might, if so advised, intervene on behalf of the Imperial Government. The Attorney-General attended at their Lordships' bar and stated that, having considered the issue raised in the case, he did not deem it his duty to offer any argument on the matter. It may therefore be taken that the appellant's contention in support of the validity of this Canadian legislation is not regarded as contrary to any Imperial interest. This of course does not affect in any way the pure question of law arising on the interpretation of the British North America Act, as that question has been defined above.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to " bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes: *Royal Bank of Canada* v. *Larue*. (1) Now from early times the customs legislation of the Imperial Parliament has contained anti-smuggling provisions authorizing the seizure of vessels having dutiable goods on board when found " hovering " off the coast within distances substantially in excess of the ordinary territorial limits. So far back as

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(1) [1928] A. C. 187.

1768 there is to be found in the statute 9 Geo. 3, c. 9, s. 22, legislation authorizing the forfeiture of dutiable goods found in vessels " hovering " within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the " Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by s. 179, authorized the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the coast. The previous Imperial Act of 1853 (16 & 17 Vict. c. 107), which was in force when the British North America Act was passed, dealt, in s. 212, with even greater distances from the coast. It is not without interest to note as a matter of history that the risk of illicit trade between the French island of St. Pierre and His Majesty's North American possessions was the subject of special legislation in a statute of 1763, 4 Geo. 3, c. 15, by s. 35 of which any British ship " hovering " within two leagues of St. Pierre and Miquelon might be seized and forfeited.

It will thus be seen that when the Imperial Parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against " hovering " were no doubt enacted by the Imperial Parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy: cf. *Att.-Gen. for Canada* v. *Cain.* (1) The British North America Act imposed no such restriction in terms and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not in pari materia.

Their Lordships' attention was drawn to s. 3 of the Statute of Westminster, 1931, by which it is "declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation," and it was suggested that this section had retrospective effect. In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

The result is that their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court of Canada reversed, and the judgment of the Supreme Court of Nova Scotia restored. The appellant will have the costs of the appeal and in the Supreme Court of Canada.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Lawrence Jones & Co.*

(1) [1906] A. C. 542.

Applied. CANADIAN FED. OF AGRICULTURE v. ATT.-GEN. FOR QUEBEC [1951] A. C. 179

[PRIVY COUNCIL.]

J. C.*
1932
Nov. 10.

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE } APPELLANTS;

AND

CRYSTAL DAIRY, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Legislative Power—Taxation—Adjustment of Profits between Traders—Levies on Dairy Farmers—Agriculture—Dairy Products Sales Adjustment Act, 1929 (*Stat. of B. C.,* 1929, *c.* 20)—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2; *s.* 95.

Because it was more profitable to dairy farmers in British Columbia to sell their milk in a fluid form than to sell products manufactured from it, the market for fluid milk became glutted. As a remedy the Provincial legislature passed the Dairy Products Sales Adjustment Act, 1929 (amended in 1930 and 1931), authorizing the appointment of an Adjustment Committee in any district in which the dairy farmers petitioned for one. Where a Committee was appointed the farmers had to make returns to it, and a farmer selling fluid milk had to pay to the Committee a levy assessed according to the quantity he had sold; the total of these levies, which together made up the difference in value of the milk disposed of in the two forms, was to be apportioned by the Committee among the farmers who had sold milk products. The expenses of the Committee were to be met by a further levy on the farmers. Both levies were recoverable as debts.

Held, that both levies were taxes, and, as they would tend to affect the price of commodities, they were indirect taxes, and the Act was therefore ultra vires the Province having regard to s. 91, head 3, and s. 92, head 2, of the British North America Act, 1867; it was unnecessary to determine whether the Act was invalid also under s. 91, head 2, as being for the regulation of trade and commerce. The Act was not in relation to agriculture so as to be within s. 95.

Workmen's Compensation Board v. *Canadian Pacific Ry. Co.* [1920] A. C. 184 distinguished.

Judgment of the Court of Appeal of British Columbia affirmed.

APPEAL (No. 28 of 1932) from a judgment of the Court of Appeal of British Columbia (January 5, 1932) affirming a judgment of Murphy J. (September 6, 1931).

* *Present:* LORD TOMLIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

The appellants brought an action against the respondents in the Supreme Court of British Columbia for a mandamus directing the respondents to make to them certain returns in accordance with the Dairy Products Sales Adjustment Act, 1929 (Stat. of British Columbia, 1929), c. 20), as amended by c. 13 of 1930, and c. 14 of 1931. The respondents by their defence pleaded that the above legislation was ultra vires the Provincial legislature under the British North America Act, 1867.

The effect of the legislation in question appears from the judgment of the Judicial Committee.

The Court of Appeal of British Columbia, affirming the judgment of the trial judge, held that the legislation was ultra vires on the ground that the levies imposed by the Act were taxes, and the taxation was not direct so as to be valid under s. 92, head 2, of the Act of 1867.

1932. July 11, 12, 14, 15, 18. *Maitland K.C.* and *Frank Gahan* for the appellants. The Act was intra vires the Provincial legislature under the British North America Act, 1867, s. 92, head 13 (property and civil rights), and head 16 (local and private matters); the appellants rely also upon s. 95, which authorizes laws as to agriculture in the Province. The levies were not taxes. The Act of 1867 uses the word "taxation" to mean imposts to replenish the revenue of the Dominion or a Province; that agrees with the meaning of "tax" according to English cases: *Brewster* v. *Kidgill* (1); *Baker* v. *Greenhill* (2); *Att.-Gen.* v. *Wilts United Dairies, Ld.* (3), affirmed by the House of Lords. (4) The levies were merely part of a scheme for pooling the profits in a Provincial trade, without assistance from, or benefit to, the Provincial exchequer. The levies were for services rendered, and for that reason also were not taxes: *Cotton* v. *The King*. (5) In *Lawson* v. *Interior, etc., Committee of Direction* (6) the legislation was invalid because its purpose was beyond the

(1) (1697) 12 Mod. 166.
(2) (1842) 3 Q. B. 148, 163.
(3) (1921) 124 L. T. 319, 322.
(4) [1922] W. N. 217.
(5) [1914] A. C. 176, 195.
(6) [1931] S. C. R. 357.

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powers of the Provincial legislature. If, however, the levies were taxes they were direct taxation falling upon the farmers: *In re Validity of Manitoba Act* (1), affirmed by the Board, *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada.* (2) No tendency to pass the levies on to consumers was shown, nor is that necessarily the true test: *Halifax Corporation* v. *Fairbanks' Estate.* (3) If the levies were taxes they were direct taxation, as in the case of the contributions considered in *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (4) That case is not an authority that the levies were taxes, because there the contributions were paid into the Provincial revenue. Further, the levies could be assessed upon the dairy farmers under s. 92, head 9, of the Act. An impost under that head may be direct or indirect taxation: *Lawson* v. *Interior, etc., Committee of Direction.* (5) That view was mentioned in *Att.-Gen. for Quebec* v. *Reed* (6) without a decision whether or not it was correct. The Dominion Parliament could not validly have passed the Act now in question: *In re Board of Commerce Act, 1919* (7); *Toronto Electric Commissioners* v. *Snider.* (8)

Tilley K.C. for the respondents. The levies were compulsorily imposed under statutory powers for a public purpose, and were recoverable by action; they were therefore taxes: *City of Halifax* v. *Nova Scotia Car Works, Ld.* (9); *Cité de Montréal* v. *Ecclésiastiques du Séminaire de St. Sulpice* (10); *Lawson* v. *Interior, etc., Committee of Direction.* (11) There would be a tendency to pass on the levy; the Act contemplated a rise in prices. The taxation therefore was indirect, and the Act invalid: *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (12) and cases there referred to; *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (13) In *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (4) the Act did not impose a tax upon a

(1) [1924] S. C. R. 317, 322.
(2) [1925] A. C. 561.
(3) [1928] A. C. 117.
(4) [1920] A. C. 184.
(5) [1931] S. C. R. 357, 363, 364.
(6) (1884) 10 App. Cas. 141, 144.
(7) [1922] 1 A. C. 191.
(8) [1925] A. C. 396.
(9) [1914] A. C. 992.
(10) (1889) 14 App. Cas. 660.
(11) [1931] S. C. R. 357, 362.
(12) [1927] A. C. 934.
(13) [1930] A. C. 357.

commodity; although the contributions under the Act there considered were paid into the Provincial revenue they were allocated, as in this case, to a particular purpose. The Act was also invalid, because, as was held in *Lawson's* case (1) with regard to the Act there in question, it conflicted with the power of the Dominion Parliament under s. 91, head 2, to regulate trade and commerce. The manufactured products passed outside the Province in the course of trade, and the dairy farmers selling fluid milk were assessed for the benefit of the exporters of milk products. The power under s. 91, head 2, has been rather overlooked. Where that power overlaps the Provincial power under head 13 of s. 92, the Dominion power prevails. A Province cannot legislate to regulate a trade which may pass outside the Province; nor can the power to impose direct taxation be used as a method of regulating a trade. The civil rights referred to in s. 92, head 13, are personal rights in the Province. The judgments of the Board dealing with the conflict between s. 91, head 2, and s. 92, heads 13 and 16, do not support the view that a Province can legislate so as to deal with trade as trade. [Reference was made to *Citizens Insurance Co.* v. *Parsons* (2); *Bank of Toronto* v. *Lambe* (3); *John Deere Plow Co.* v. *Wharton* (4); *Att.-Gen. for Canada* v. *Att.-Gen. for Alberta* (5); *Board of Commerce Act, 1919* (6); *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada*. (7)] Further, the Act is invalid, because it is repugnant to, and unworkable with, the Combines Investigation Act (R. S. Can., 1927, c. 26), which the Board held to be valid in the case last mentioned. For that reason, as well as having regard to its provisions, the Act is not within s. 95.

Maitland K.C. in reply. The trade dealt with by the Act was a Provincial trade, and there is no decision of the Board that a Provincial legislature cannot deal with a trade of that nature. If the adjustment levy was not a tax then the

(1) [1931] S. C. R. 357.
(2) (1881) 7 App. Cas. 96.
(3) (1887) 12 App. Cas. 575.
(4) [1915] A. C. 330.
(5) [1916] 1 A. C. 588.
(6) [1922] 1 A. C. 191.
(7) [1931] A. C. 310.

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expenses levy was valid as being merely ancillary to competent legislation.

Nov. 10. The judgment of their Lordships was delivered by

LORD THANKERTON. This appeal arises out of an action by the appellants for a mandamus commanding the respondents, as a "distributor" as defined by s. 2 of the Dairy Products Sales Adjustment Act, being c. 20 of the Statutes of British Columbia, 1929, as amended by the Statutes, 1930, c. 13, and 1931, c. 14 (hereinafter called "the Act of 1929"), to make forthwith to the appellants, an incorporated Committee appointed under the Act of 1929, returns of all milk or manufactured products purchased or received by the respondents from dairy farmers as defined by the Act and for damages.

The action was brought in the Supreme Court of British Columbia, and is contested by the respondents on the ground that the Act of 1929 is ultra vires and beyond the competence of the legislature of the Province of British Columbia.

The case was tried by Murphy J., who gave judgment on September 26, 1931, dismissing the action. On an appeal by the present appellants, the Court of Appeal of British Columbia affirmed the judgment of Murphy J. on January 5, 1932, and the appellants now appeal from that judgment.

Sect. 3 of the Act of 1929 authorizes the Lieutenant-Governor in Council, upon a petition supported by 66 per cent. of the dairy farmers present at a meeting held in terms of s. 4, to appoint an Adjustment Committee, in such portion of the Province as may be set forth in the order, to ascertain and apportion between the dairy farmers the returns received from the sale of milk on the fluid market and the sale of manufactured products, which are defined as any product manufactured wholly from, or derived by any form of treatment from, milk.

The appellant Committee were so appointed in 1929 for the Lower Mainland District of the Province. The chief market for disposal of fluid milk in that district is in the Cities of Vancouver and New Westminster.

It is common ground that disposal of milk in its fluid form affords a better return to the dairy farmer than its disposal in manufactured form, and, as the Act makes clear, the purpose of the legislature was to relieve congestion in the fluid milk market, caused by a shortage of demand. Broadly stated, this object is attained by the Committee fixing monthly the standard prices for fluid milk and manufactured products respectively and the weight and quantity of each sold or disposed of by all the farmers in the district, based on returns compulsorily obtained from them, and thereafter apportioning the difference between the total value of the sales of each, calculated at the respective standard prices, over the whole body of farmers, in proportion to the weight of fluid milk sold or disposed of by each farmer. Each farmer is then bound to contribute his share of the apportionment to the Committee, who apportion and pay the total amount so received to the farmers who have sold or disposed of the manufactured products. This contribution by the farmers is hereinafter called the " adjustment levy."

The expenses of the Committee are met by a compulsory levy collected from the farmers, hereinafter called the " expenses levy."

The adjustment levy and the expenses levy are both recoverable by the Committee as a debt (s. 11), and the Committee may also require from the farmer an order for their amount on the purchaser of the farmer's milk or manufactured products (s. 9 (*g*)).

The main question at issue between the parties is whether the imposition of these levies, or either of them, involves taxation within the meaning of ss. 91 and 92 of the British North America Act, 1867, and, if so, whether they constitute direct taxation within the meaning of s. 92, head 2, of the Act. Both the Courts below have held that both these levies are taxes and do not constitute direct taxation, and that the legislation is ultra vires of the Province. M. A. Macdonald J. felt bound by the decisions to hold, contrary to his personal view, that the adjustment levy was taxation and indirect; while holding that the expenses levy was an indirect tax, he doubted whether on that ground alone the whole Act would have to be regarded as ultra vires.

In the first place, it is clear, in the opinion of their Lordships, that the substantive provision of the Act of 1929 is to transfer compulsorily a portion of the returns obtained by the traders in the fluid milk market to the traders in the manufactured products market; the other statutory provisions afford the machinery by which this is enabled to be done. The decision of this appeal turns mainly, if not entirely, on whether such a compulsory transfer is within the legislative competence of the Province.

The appellants based their contention that the Act is intra vires of the Province (*a*) on head 13 of s. 92 of the Act of 1867—" property and civil rights in the Province "; (*b*) on head 16—" Generally, all matters of a merely local or private nature in the Province," and (*c*) on s. 95 of the Act of 1867, which empowers the legislature in each Province to make laws in relation to agriculture in the Province, so long as they are not repugnant to any existing law of the Dominion Parliament.

The respondents founded (*a*) on head 3 of s. 91 of the Act of 1867, claiming that the Act of 1929 operated as taxation, and was not direct taxation, which is lawful to the Province under head 2 of s. 92 of the Act of 1867; (*b*) that the Act of 1929 was an attempt to regulate trade in infringement of the reservation of trade and commerce to the Dominion under head 2 of s. 91 of the Act of 1867; and (*c*) that it dealt with the merchanting of commodities and was not local in its operation, and was repugnant to existing legislation as to trade combines.

In the first place, the contention of the appellants that the Act of 1929 is a law relating to agriculture under s. 95 of the Act of 1867 may be disposed of as untenable, for the Act of 1929 does not appear in any way to interfere with the agricultural operations of the farmers, and s. 21 of the Act expressly prohibits the Committee from fixing prices at which milk or manufactured products may be sold, and from directing in what quantity, to whom, or when milk or manufactured products may be sold or disposed of by a dairy farmer.

The main issue of this appeal is whether the adjustment levies are taxes, and, if so, whether they are direct taxes. If both these questions are to be answered affirmatively, it matters not that they incidentally affect property and civil rights in the Province, for taxation necessarily has that effect, and the closing words of s. 91 will exclude any operation of para. 16 of s. 92. In that event it would be unnecessary to consider the remaining contentions of the respondents.

In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s. 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be prima facie evidence in all Courts that such amount is due by the dairy farmer (s. 11). A dairy farmer who fails to comply with every determination, order or regulation made by a Committee under the Act is to be guilty of an offence against the Act (s. 13), and to be liable to a fine under s. 19. Compulsion is an essential feature of taxation: *City of Halifax* v. *Nova Scotia Car Works, Ld.* (1) Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s. 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interests of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s. 12, sub-s. 2, and s. 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made. The district here affected is a considerable part of the whole Province, but the

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(1) [1914] A. C. 992, 998.

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Act might have still wider application within the Province. While not saying that these elements are exhaustive of the elements which might be found in other cases to point to the same conclusion, their Lordships are of opinion that they are sufficient to characterize the adjustment levies in the present case as taxes. Somewhat similar considerations led Duff J. to the same conclusion as regards the levy for expenses in *Lawson's* case (1), though the other members of the Court do not appear to have found it necessary to express any opinion on that ground of judgment, the main ground of decision being on "the regulation of trade and commerce."

It seems to follow that the expenses levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes.

The principles on which taxes are to be classified as direct or indirect are now well established by decisions of this Board, which it is quite unnecessary to recapitulate. They are summarized in *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (2) The adjustment levies are imposed on traders in the fluid milk market in proportion to the weight sold or disposed of by each of them calculated at the standard price; the expenses levies are imposed "on milk and (or) manufactured products sold or disposed of." In effect, both levies are imposed on the sale of commodities by the persons taxed, and, in their Lordships' opinion, there can be little doubt that such taxes have a tendency to enter into and affect the price which the taxpayer will seek to obtain for his commodities, as is the case with excise and customs. That tendency is likely to be enhanced in the present case by the limitation of competition among the dealers in the fluid milk market, which seems to follow from the compensating bonus given to those who deal in the less remunerative market for manufactured products.

The distinction between the present class of tax and that class of direct tax of which the assessments for the workmen's compensation fund were an example (*Workmen's Compensation*

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(1) [1931] S. C. R. 357, 362.

(2) [1927] A. C. 934, 937.

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Board v. *Canadian Pacific Ry. Co.* (1)) is pointed out in the judgment of the Board in that case. Lord Haldane, in delivering the judgment, says: "Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for Provincial purposes. In *Bank of Toronto* v. *Lambe* (2) it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business."

The tax in that case was assessed according to the amount of the employers' pay-rolls. The tax here is imposed on the proceeds of particular transactions. Their Lordships are of opinion that both the levies here are indirect taxes. It is therefore unnecessary to consider the remaining contentions of the respondents.

Their Lordships are therefore of opinion that the Act of 1929, as amended, was not within the legislative competence of the Province, and that the decision of the Courts below was correct. They will humbly advise His Majesty that the judgment appealed from should be affirmed and that the appeal should be dismissed.

In accordance with an arrangement between the parties there will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Gard, Lyell & Co.*

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(1) [1920] A. C. 184, 190.

(2) 12 App. Cas. 575.

[PRIVY COUNCIL.]

J. C.*
1932
Nov. 24.

SAMINATHAN CHETTY . . . . APPELLANT;

AND

POORTEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Mortgage—Redemption—Clog on Equity—Construction of Deeds—Provision for Repayment on Sale—Right to redeem before Sale.

Roman-Dutch law as applied in Ceylon recognizes a principle which bears a close resemblance to the principle of English law embodied in the maxim "once a mortgage always a mortgage."

A syndicate purchased forest land in Ceylon and conveyed it by deed to the respondent, who had provided the greater part of the purchase price. A second deed of the same date recited the facts, and provided that the respondent should hold as absolute owner with power to manage and to sell the lands for the best available price (approval to be obtained if the price was less than Rs.100 per acre) and to apply all moneys realized in payment of sums due to him for purchase price or management expenses, and that he should pay over the balance pro rata, according to their interests, among the syndicate. A year later, before the lands had been sold, members of the syndicate sued claiming to redeem. The respondent had settled with all the plaintiffs except two, who were represented by the appellant.

Held, that upon the true construction of the two deeds they created a security for money advanced, there being imposed upon the respondent duties and obligations of the nature of trusts, and that the appellant was entitled to redeem the shares of the two plaintiffs on payment of their rateable proportion of the amount due, which was to be ascertained on taking accounts as directed.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 117 of 1930) from a decree of the Supreme Court of Ceylon (March 17, 1930) reversing a decree of the District Court of Colombo (July 19, 1929).

The suit related to a tract of forest land situate near Thenkitiya in Ceylon, and was instituted by six plaintiffs against the respondent, as first defendant, and others. Before the trial the respondent settled the claims of all the plaintiffs except two, who were now represented by the

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* *Present:* LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

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appellant. The plaintiffs claimed that under two deeds dated March 29, 1924, and in the circumstances in which they were executed, the land was held by the respondent in trust for them, that there had been breaches of the trust, and that they were entitled to redeem.

The facts are fully stated in the judgment of the Judicial Committee.

The Supreme Court, reversing the District Court, dismissed the suit upon grounds which appear from the present judgment.

1932. Oct. 28, 31. *De Gruyther K.C.* and *H. I. P. Hallett* for the appellant.

Lavington and *Elkin* for the respondent.

[Reference was made to Pereira's Laws of Ceylon, 2nd ed., pp. 3, 4; *John* v. *Trimble* (1); *Murugaser Marimuttu* v. *de Soysa* (2); *Siribohamy* v. *Rattanranhamy* (3); and *Mehrban Khan* v. *Makhna.* (4)]

Nov. 24. The judgment of their Lordships was delivered by

LORD TOMLIN. In this case the appellant appeals to His Majesty in Council from a decree of the Supreme Court of the Island of Ceylon, dated March 12, 1930, whereby a decree of the District Court of Colombo in favour of the appellant, dated July 19, 1929, was set aside and the action was dismissed with costs. The relevant facts are set out in the succeeding narrative.

In the year 1923 an action as to title to an estate in Ceylon, consisting of about 14,000 acres of forest land, was in progress between the Crown and certain persons who and whose successors in title will be hereafter referred to collectively as the Syndicate. The appellant is the representative of a person, now deceased, who was a member of the Syndicate in two capacities, one original, and the other

(1) (1902) 1 T. H. (Witwatersrand H. C.) 146.

(2) [1891] A. C. 69.

(3) (1891) 1 Ceylon L. R. 36.

(4) (1930) L. R. 57 I. A. 168.

derivative. The Syndicate had expended sums to the amount of Rs.200,000 in acquiring the estate from those whom they believed to be the owners of it. After they had done so the Crown asserted title to it, and the action in question resulted. On March 28, 1923, a decree was made in the action between the Crown and Syndicate whereby it was declared that the estate was the property of the Crown, but whereby also the Crown submitted to sell the estate to the Syndicate provided that a sum of Rs.275,000 was deposited with the Settlement Officer within twelve months from the date of the decree. The Syndicate, towards the end of the period allowed under the decree of March 28, 1923, for making the deposit, had succeeded in raising no more than Rs.64,000 towards such deposit, and the respondent, who was approached to assist the Syndicate, provided at the last moment the balance, Rs.211,000. By means of the Rs.64,000 already raised and the money provided by the respondent, the deposit was in fact made just before the time for making it expired. A sum of Rs.5160 was immediately repaid to the respondent, so that the sum actually provided by him was Rs.205,840. No definite agreement appears to have been made between the Syndicate and the respondent at the time when the money was provided as to the terms upon which it was provided, but the respondent then instructed his proctor to see that he was properly protected. On March 29, 1924, after the deposit had been made, the Syndicate executed a deed which purported to be an assignment by the Syndicate to the respondent for Rs.30,000 of the benefit of the decree of March 28, 1923. No sum of Rs.30,000 was in fact paid or intended to be paid by the respondent to the Syndicate. Having regard to the circumstances of its execution their Lordships are of opinion that the only purpose of this document was to give the respondent a temporary security for the money he had advanced. Subsequently the Crown were requested by the Syndicate to make the grant under the decree of March 28, 1923, directly to the respondent, but this request was refused. After the refusal two deeds were executed, respectively dated March 2, 1925, and numbered in the record 471 and 472.

Deed No. 471 recited the deed of March 29, 1924, and the request made to the Crown, but not the Crown's refusal of that request, and was framed as an out-and-out conveyance by the Syndicate to the respondent of the whole estate with the exception of a defined portion of 1000 acres on the south-eastern side thereof, which had apparently been otherwise disposed of, to hold unto the respondent, his heirs, executors, administrators and assigns absolutely and for ever.

Deed No. 472 was of even date with deed No. 471. Upon its construction and effect the result of this appeal mainly depends. It was made between the respondent of the first part and the persons then constituting the Syndicate of the second and third parts, the group of persons who were of the third part being persons claiming derivative interest under original members of the Syndicate.

This deed contained recitals in the following terms: [They were fully set out in the judgment. Shortly stated they were (1.) As to the circumstances, above mentioned, in which the party of the first part had provided funds for the purchase; (2.) As to the conveyance by deed No. 471; (3.) That the parties of second and third parts had required the party of the first part to enter into these presents and to declare their interests in the premises.]

The operative part of the deed was as follows: "Now know ye and these presents witness that the party of the first part shall hold and stand possessed of the said lands as absolute owner and with full power and authority to manage and control the same to fell and remove and dispose of the timber therein and to put the said lands to such use as he shall think fit in his absolute discretion and to sell the said lands for the best available price with or without the timber therein, such price to be in his absolute discretion provided that if the price is less than Rupees one hundred (Rs.100/-) per acre he shall obtain the approval of the parties of the second part for such sale and to apply all moneys realised by him in respect of the sale of such timber and of the said lands or any portion thereof in payment of such sums as shall be due and payable to him for moneys advanced to the Crown for the said purchase from the Crown and moneys expended on the management, control and working of the said lands as aforesaid and of such compensation or profits for himself as he shall think reasonable and equitable in his own discretion and shall pay over the balance pro rata according to their respective interests amongst the said parties of the second and third parts or their successors in title and such other person or persons as shall have a legal claim to or interest in the said lands, provided, however, that it shall not be obligatory on any purchaser from the party of the first part to see to the application of the purchase money by the said party of the first part in manner herein provided and receipt by him shall be a full and complete discharge to such purchaser for the payment of such purchase money."

Possession was taken by the respondent of the property conveyed by deed No. 471 after the execution thereof, and he has since remained in possession. The respondent after going into possession admittedly cut and sold a considerable quantity of timber and alleges that he expended large sums in cultivating and improving the estate. No account of receipts or expenditure has ever been rendered by the respondent.

On March 30, 1925, the Crown executed a conveyance of the estate to the Syndicate or the survivors of the original members thereof.

Efforts to sell the estate were apparently made from time to time both by the respondent and members of the Syndicate, but without result.

On March 14, 1926, certain of the Syndicate, having had interviews with the respondent with a view to redeeming the estate and being dissatisfied with the position, wrote asking him to state forthwith the amount to be paid to him, and in doing so to consider " your responsibility to us as our trustee in respect of the land."

The answer of the respondent on the same day stated: "I am willing to take Rs.500,000 as consideration for

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reconveyance of the Tenkitiya lands provided that the claims of the Bandas and any other claims in respect of the lands are settled by you. As an alternative I have no objection to paying you rupees thirty per acre in full settlement of all your interests in the land provided that all claims are settled by you."

The amount claimed by the respondent was regarded by those seeking to redeem as exorbitant, and as no sale was effected the action out of which this appeal arises was begun by certain members of the Syndicate (including the person of whom the appellant is the representative) against the respondent and the other members of the Syndicate who did not join as plaintiffs.

The action was in the nature of an action for breach of trust and redemption. After it was begun the plaintiffs obtained leave to amend their plaint by adding an allegation that the respondent had by a document dated July 26, 1926, fraudulently and in breach of trust given to one Fombertaux an option of purchase over the site and to add Fombertaux as an additional defendant to the action. The amended plaint stated (para. 7) the willingness of the plaintiffs to redeem upon the footing that the amount due to the respondent was the aggregate total of the sum advanced, money expended, interest at 9 per cent. per annum to the date of the plaint, and a sum of Rs.25,000 for reasonable compensation and profit for the respondent's services, such aggregate total amounting, apart from expenditure, to Rs.274,090.

By para. 8 the plaintiffs pleaded that by reason of deed No. 472 and of the facts alleged in the plaint, the respondent held the estate in trust for the plaintiffs and the defendants other than the respondents. In para. 10 the plaintiffs expressed their willingness to pay what was due and alleged that the Rs.500,000 claimed by the respondent was unreasonable. In para. 11 they claimed an account of all moneys expended by the respondent and asked the Court to declare what sum was reasonable and equitable compensation and profit for his services.

In para. 13 the plaintiffs alleged that the respondent was fraudulently and in breach of trust attempting to effect a fictitious sale to a nominee of his own at a price less than the market price, and in para. 17 the option of July 27, 1926, to Fombertaux was stated and alleged to be fraudulent and in breach of trust.

By the prayer of the amended plaint [(which the judgment set out in full) the plaintiffs claimed—(1.) a declaration that Rs.274,090 was a reasonable sum to be paid in respect of the loan and compensation, or that it be declared what sum was reasonable; (2.) accounts; (3.) reconveyance on payment, and all necessary directions; (4.) an injunction and other relief.]

By his answer the respondent, while admitting deeds Nos. 471 and 472, alleged that the plaintiffs had no right or title to obtain a reconveyance, and denied that he held the estate in trust for the plaintiffs and the other defendants. He further denied the plaintiffs' right to any account or to any declaration as to his compensation. He denied the allegations of para. 13 of the amended plaint, and while admitting the option given to Fombertaux, denied that it was fraudulent or in breach of trust. The two concluding paragraphs of the respondent's answer (in which answer he is throughout referred to as the first defendant) were in the following terms: "14. Further, the first defendant states that he has duly performed and is willing to perform the terms of agreement as set out in the said deed No. 472 and that no cause of action has accrued to the plaintiffs against the first defendant. 15. As a matter of law the first defendant states that the plaintiffs have no rights of action in any event until the first defendant sells the said lands in terms of the said deed No. 472 and that this action is premature and cannot be maintained."

In fact, Fombertaux never exercised the option of July 26, 1926, and the question in regard to it was, therefore, not pursued.

Further, before the trial of the action the respondent settled with all the members of the Syndicate, except the person whom the appellant represents.

The person whom the appellant represents died before the trial and the appellant was substituted for him.

The District Judge gave his judgment on July 19, 1929. After considering the question of the admissibility of oral evidence to prove whether under the deeds Nos. 471 and 472 the respondent held the estate upon a trust and ruling it was admissible, he held that the deeds Nos. 471 and 472, taken by themselves, indicated a trust, and that the evidence showed that the respondent at the time of the advance was willing to give back the property directly he was paid his money, and that there being no express provision applicable if the respondent refused or failed to sell, he must in that event reconvey the estate if called upon to do so and upon being paid the money due to him. The learned judge further held that the respondent had failed to sell the estate and had become liable to re-transfer the shares of the person whom the appellant represents.

The operative part of the formal decree ordered and decreed that the first defendant is holding the property set out in schedule hereto in trust for the plaintiffs and second to seventh defendants. It further ordered the first defendant to file accounts, and that upon payment of the sum of money due to him he should reconvey to the substituted plaintiffs in place of the third and fifth plaintiffs their shares of the said properties.

This decree, even upon the assumption that the learned judge was right in his conclusion, does not seem, in their Lordships' opinion, to give effect accurately to that conclusion. It makes no provision in regard to interest and contemplates a reconveyance to the redeeming plaintiff of his shares on payment, not of his proportion, but of the whole of what was due to the respondent.

The respondent appealed. The appeal was heard by Fisher C.J. and Akbar J., and judgment was given on March 10, 1930. The appeal was allowed and the action was dismissed.

The Chief Justice said the question for decision was with regard to the effect of deed No. 472, and that in his opinion the relationship created by that document was not that of trustee and cestui que trust, but was purely contractual, and that he did not think that it was correct to regard the land as being a security for a debt. Akbar J. held that the respondent was right when he pleaded that no rights could accrue to the plaintiff till the property had been sold and that the action was premature, and further that there was no such trust as contended for by the plaintiff.

Having regard to the views which were taken by the learned judges in the Court below, there was no discussion below of the law of Ceylon in regard to trusts and mortgages, and their Lordships have therefore been without assistance from the lower Courts on these matters, which seem to them of some importance in the case.

In their Lordships' judgment, the first question is as to the construction and effects of the deeds Nos. 471 and 472.

Having regard to the circumstances leading up to and surrounding their execution and to the language employed therein, these deeds, in their Lordships' opinion, clearly do not operate to vest in the respondent an absolute interest in the property conveyed.

It cannot be overlooked that the Syndicate had expended about Rs.200,000 on the property before they got into conflict with the Crown, and that they provided Rs.64,000 towards the total sum which had to be deposited under the decree made in the Crown's favour. They could, therefore, have had no interest in entering into an arrangement by which in effect the whole property passed absolutely to the respondent and their expenditure was wholly lost.

But the language of deed 472 is, their Lordships think, inconsistent with any such conclusion. By the terms of the documents: (1.) the respondent cannot sell below a certain price without the consent of the original members of the Syndicate; (2.) if he does sell he has imposed upon him an obligation to deal with the proceeds in a specified manner; (3.) the distribution of the proceeds of sale includes payment to the respondent of "such sums as shall be due and payable to him for moneys advanced to the Crown for the said purchase from the Crown"; (4.) the ultimate balance of the proceeds of sale is to be distributed "pro rata according to their interests amongst the said parties of the second and third parts or their successors in title and such other person or persons as shall have a legal claim or interest in the said lands," and (5.) the purchaser is relieved of any obligation to see to the application of the purchase money.

In these circumstances and upon this language their Lordships conclude without hesitation that the transaction effected by deeds Nos. 471 and 472 was the creation of a security for money advanced, which in certain events imposed upon the respondent, who was the creditor, duties and obligations in the nature of trusts.

Deed No. 472 does not, however, impose upon the respondent an express obligation to sell; it only authorizes him to sell and provides for the distribution of the proceeds if he does sell.

The question is what is the position if the respondent does not sell or so long as the property remains unsold.

The policy of the Roman-Dutch law, being the law which governs in Ceylon, so far at any rate as this case is concerned, appears to be against allowing the mortgaged property to become the property of the creditor if the mortgage debt is not paid off within the specified time. In this respect the Roman-Dutch law recognizes something which bears a close resemblance to the principle of English law embodied in the maxim: "Once a mortgage, always a mortgage." This trend of policy is well illustrated by the case of *John* v. *Trimble* (1) decided in the Transvaal High Court. In that case the debtor agreed with the creditor that the mortgaged property should be reconveyed if the debt was paid off within two years, but that otherwise the creditor was to be free to sell and pay himself. More than two years after the agreement the debtor sought to redeem, but the creditor nevertheless sold to the defendant. It was held that the debtor was entitled to redeem against the defendant. Innes C.J. in his judgment accepted the view that the policy of the law was against allowing an agreement between debtor and creditor to the effect that if the debt be not paid at the proper time the property was to become the property of the creditor, and held that the transfer by the creditor to the defendant could not operate as a sale so as to defeat the debtor's right to redeem the property.

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(1) 1 T. H. (Witwatersrand H. C.) 146.

So far as Ceylon is concerned the case of *Siribohamy* v. *Rattanranhamy* (1) seems to their Lordships to indicate that the benevolence of the Roman-Dutch law towards the mortgagor is not less in Ceylon than it is in South Africa.

The conclusion must therefore be that nothing in deed No. 472 can preclude the debtors from at any time redeeming the mortgaged property. The fact that the respondent settled with all the debtors except one cannot put that one in a worse position, and their Lordships are of opinion that the appellant, as representing the person with whom no settlement was made, is entitled to redeem his shares on payment of his rateable proportion of the total amount due to the respondent.

In ascertaining the amount due their Lordships think that no regard should be had to the provision of deed No. 472 as to " compensation or profits." That provision is expressed to operate only in the event which has not happened of the respondent exercising his power of sale. It is, however, right that reasonable interest should be allowed on moneys advanced or expended.

Bearing these considerations in mind, their Lordships think that the appeal should be allowed and that the decree below should be discharged except so far as the costs of the added defendant Fombertaux were ordered to be paid. That direction should stand.

Their Lordships do not, however, think that the decree of the District Judge should be restored, but that a decree should be framed providing for the following matters :—

(*a*) A declaration that upon the true construction of deeds Nos. 471 and 472 and in the events which have happened the appellant is entitled to redeem upon the terms hereinafter appearing the shares of the person whom he represents in the property conveyed by deed No. 471.

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(1) 1 Ceylon L. R. 36.

(*b*) A direction for the taking of the following inquiry and accounts: (i.) An inquiry as to the amount of the shares in the property in question of the person whom the appellant represents. (ii.) An account of what is due to the respondent for principal moneys advanced to provide the deposit under the decree of March 28, 1923, and for moneys properly expended by him in the management and control of the property, together with interest at such rate as the Court shall deem reasonable upon the moneys advanced or expended from the respective dates of such advance or expenditure to the date of decree. (iii.) An account of rents and profits (including proceeds of sale of timber and other produce) of the property received by the respondent or by any other person or persons by the order or for the use of the respondent or which without the wilful default of the respondent might have been so received, with interest at such rate as aforesaid upon such rents and profits from the respective dates of receipt to the date of decree. (iv.) An account of the costs payable to the appellant by the respondent under their Lordships' direction as to payment of costs hereinafter contained and remaining unpaid.

(*c*) A direction that the amounts certified under account (iii.) shall be deducted from the amount certified under account (ii.), and that upon payment by the appellant to the respondent of the proportionate part of the balance so found corresponding with the shares which shall be certified under inquiry (i.) to be the shares in the property of the person whom the appellant represents, less any costs payable to the appellant under account (iv.) remaining unpaid, the respondent shall reconvey to the appellant the shares in the property of such person.

(*d*) Such other directions as the Court may deem necessary or appropriate for working out the decree.

The respondent has throughout contended that the action was premature and ought to be dismissed, and disputed

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the plaintiffs' right to redeem. In these circumstances their Lordships are of opinion that the respondent ought to pay the costs of the person whom the appellant represents and of the appellant of the action up to the decree and of the appeal before the Supreme Court and of the appeal to His Majesty in Council. Any subsequent costs in this action in working out the decree or otherwise will remain to be dealt with in due course by the Court having seisin of the matter.

Their Lordships will accordingly humbly tender to His Majesty advice in accordance with the conclusions which are indicated in this judgment.

Solicitor for appellant: *O. A. Cayley.*
Solicitors for respondent: *Abbott & Hudson.*

[PRIVY COUNCIL.]

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Dec. 9.

WEERASEKERA . . . . APPELLANT;

AND

PEIRIS . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Mahomedans—Deed of Gift—Fidei Commissum—Absence of Delivery of Possession.

A Mahomedan resident in Ceylon executed in 1904 a deed purporting to give immovable property to his son, subject to conditions and restrictions inconsistent with an intention to make a gift as recognized by Mahomedan law but creating a valid fidei commissum according to Roman-Dutch law:—

Held, that the deed was not invalid on the ground that there had been no delivery of possession to the donee as required by Mahomedan law for the validity of a gift.

Judgment of the Supreme Court of Ceylon, 32 Ceylon N. L. R. 176, reversed.

APPEAL (No. 62 of 1931) from a decree of the Supreme Court of Ceylon (January 20, 1931) reversing a decree of the District Court of Colombo (July 15, 1930).

* *Present:* LORD TOMLIN, LORD THANKERTON, and SIR LANCELOT SANDERSON.

The appellant instituted a suit based upon a deed of gift executed on March 11, 1904, by a Mahomedan resident in Ceylon who died in 1908 or 1909.

The only question arising upon the appeal was whether the deed was void in the absence of delivery of possession of the property comprised in it by the donor in accordance with the Mahomedan law as to gifts. The terms of the deed are set out in the judgment of the Judicial Committee.

The Supreme Court (Macdonnell C.J. and Garvin J.), reversing the decision of the trial judge, held that the deed was void in the absence of delivery of possession; the suit accordingly was dismissed. The appeal to the Supreme Court is reported at 32 Ceylon N. L. R. 176.

1932. Nov. 10, 11. *Sir Gerald Hurst K.C.* and *F. O. Langley* for the appellant. The deed clearly involved a fidei commissum according to Roman-Dutch law. A series of decisions in Ceylon have held that a deed of that nature, though made inter vivos and between Muslims, is valid although possession has not been delivered in accordance with the Muslim law as to gifts. Ordinance No. 10 of 1931 has now so provided in effect. In *Sahul Hamid* v. *Mohideen Nachahiya* (1), decided in the Supreme Court since the present case, the view was expressed, upon a consideration of the authorities, that the Ordinance is retrospective, or rather that it merely declares the pre-existing law. The donor must have intended that the deed should be effective. Its provisions are not consistent with an intention to make a gift such as is contemplated by Mahomedan law. [They were stopped.]

De Gruyther K.C. and *H. I. P. Hallett* for the respondent. Only one of the judges in *Sahul Hamid's* case (1) expressed the view that Ordinance No. 10 of 1931 was retrospective; that view was obiter and incorrect. A fidei commissum between Mahomedans in Ceylon must be complete as a gift under Mahomedan law before the fidei commissum becomes operative. Under the Code of 1806 Muslim law applied to the gift upon which the fidei commissum was based, and

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(1) (1932) 1 Ceylon Law Weekly, 268.

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under that law the gift was invalid in the absence of delivery of possession. In *Sahul Hamid's* case (1) there had been delivery of possession, and the question was whether the transaction was revocable. In other cases there mentioned the question was not that which now arises but whether the conditions were operative under Mahomedan law or having regard to Ordinance No. 7 of 1840. [Reference was made to *Affefudeen* v. *Periatamby* (2); *Abdul Rahim* v. *Hamidu Lebbe* (3); *Meydeen* v. *Abubaker* (4); *Balkis* v. *Perera* (5); and (historically) to *Abdul Rahiman* v. *Ussan Umma* (6); also to Tyabji's Muhammadan Law, 2nd ed., pp. 373, 497, 510.]

Sir Gerald Hurst K.C. in reply. It is conceded that there is no reported case precisely similar to this. The transaction is governed by Roman-Dutch law unless it is shown that it is one excluded by the Code of 1806, or by the usage of Muslims: *Karonchihamy* v. *Angohamy* (7); Pereira's Laws of Ceylon, 2nd ed., p. 17. The deed must be treated as a whole and not as effecting two separate dispositions: *D. C. Colombo Case No. 59578.* (8)

Dec. 9. The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is an appeal by Don Charles Weerasekera, who was the plaintiff in the suit, against a decree of the Supreme Court of the Island of Ceylon, dated January 20, 1931, whereby an order of the District Court of Colombo, dated July 15, 1930, was set aside and the plaintiff's action was dismissed.

The suit was brought by the plaintiff against the defendant, Hettige Don John Peiris, claiming that certain immovable property situated within the Municipality and District of Colombo, and described in the schedule of the plaint, should be partitioned in terms of the Partition Ordinance No. 10 of 1863, and for such other and further relief as to the Court should seem meet.

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(1) (1932) 1 Ceylon Law Weekly, 268.
(2) (1911) 14 Ceylon N. L. R. 295.
(3) (1926) 28 Ceylon N. L. R. 136.
(4) (1919) 21 Ceylon N. L. R. 284.
(5) (1927) 29 Ceylon N. L. R. 284.
(6) (1916) 19 Ceylon N. L. R. 175, 184.
(7) (1904) 8 Ceylon N. L. R. 1, 8.
(8) (1878) Grenier Pt. III. 28.

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The claim was based upon a deed, dated March 11, 1904, executed by Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar (hereinafter called "the father") and his son, Arisie M. H. M. S. Hadjiar (hereinafter called "the son"), who were Mahomedans of the Shafi sect and resident in the Crown Colony of Ceylon. The deed refers to five-sixths of the property in question.

By the said deed the father purported to give, grant, assign and transfer the five-sixths share of the said premises to the son as a gift inter vivos. The plaintiff alleged that the gift was subject to a fidei commissum in favour of the children of the son and that the five-sixths share upon the death of the son, which took place on February 12, 1929, devolved upon his sons, Abdul Hassein and Mohammed Hassein. By a deed dated August 30, 1927, the plaintiff purchased all the right, title and interest of Abdul Hassein and Mohammed Hassein, and by reason thereof he claimed to be entitled to the five-sixths share of the said premises.

The father died in 1908 or 1909, and on his death the son dealt with the entire premises as if he were the sole and absolute owner thereof. He mortgaged the premises to secure a loan obtained from the trustees of the will of one E. J. Rodrigo in the year 1913. The premises were sold in execution of a mortgage decree obtained against him in 1916, and the said trustees, having purchased the said premises, entered into possession thereof. In June, 1929, the said trustees sold the said premises to the defendant, who went into and remained in possession thereof up to and at the time of the action, which was instituted on August 16, 1929.

The defendant's case was that no valid and operative gift was made by the father to the son by the deed of March 11, 1904, and that the son never took possession or held the said premises under the alleged gift. The defendant further alleged that the son, on the death of his father, entered upon the premises and enjoyed the same as absolute owner, and that he and those claiming under him, including the defendant, had acquired a title by adverse and uninterrupted possession.

The District Judge who tried the action decided in favour of the plaintiff and held that the deed of March 11, 1904, created a valid fidei commissum, and that the five-sixths share was conveyed by the father to the son subject to the restrictions set out in the deed. The District Judge further held that the possession of the defendant and his predecessors could not create a title by prescription against the children of the son, who did not die until 1929. He therefore made a decree in favour of the plaintiff in respect of the five-sixths share of the premises.

No reliance was placed in this appeal upon the title of the defendant alleged to have been created by reason of adverse possession, and the arguments on both sides were directed to the construction and effect of the deed of March 11, 1904.

The defendant appealed to the Supreme Court of Ceylon, and the learned judges of that Court held that the alleged gift by the father to the son was void and of no effect. They decided that Mahomedan law must be applied to the deed of March 11, 1904, for the purpose of testing the validity of the gift, inter vivos, and that inasmuch as the son did not take possession of the property during the lifetime of his father, there was no valid and complete gift according to Mahomedan law. They therefore allowed the appeal and dismissed the plaintiff's action. The plaintiff has appealed against this decision to His Majesty in Council.

The dates of the material facts are as follows. In 1886 the father acquired the premises in question. In January, 1903, he executed a lease of the premises for three years from February 1, 1903, in favour of a certain lessee who went into possession thereof. On March 11, 1904, the deed hereinbefore referred to was executed by the father and the son.

In June, 1906, the father granted another lease of the premises for three years from July 1, 1906, to another lessee, who went into possession thereof. In February, 1908, the 1904 deed was registered. In 1908 or 1909 the father died. In May, 1909, the son granted a lease of the premises for

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three years from July 1, 1909. On April 30, 1913, the son mortgaged the premises to the above mentioned trustees, who obtained a decree against him. The property was sold by order of Court, and purchased by the trustees in 1916. On August 30, 1927, Abdul Hassein and Mohammed Hassein sold their right, title and interest in the premises to the plaintiff. On February 12, 1929, the son died. On June 26, 1929, the defendant purchased the premises from the said trustees, and on August 16, 1929, the plaintiff instituted his suit against the defendant.

The terms of the deed of March 11, 1904, upon which this appeal depends, are as follows :—

" Know all men by these presents that I Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar of New Moor Street in Colombo for and in consideration of the natural love and affection which I have and bear unto my son Arisie Marikar Hadjiar Mohamado Salih Hadjiar of Colpetty and for divers other good causes and considerations me hereunto specially moving do hereby give grant assign transfer set over and assure unto the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar his heirs executors administrators and assigns as a gift inter vivos absolute and irrevocable the land and premises described in the schedule hereto (of the value of rupees two thousand five hundred) together with all my right title interest claim and demand whatsoever in to upon or out of the same which said premises have been held and possessed by me under and by virtue of the title deed bearing No. 2208 dated December 28, 1886, attested by James Perera notary public described in the schedule which is annexed hereto.

" To have and to hold the said premises with all and singular the appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto him the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar his heirs executors administrators and assigns for ever subject to the conditions and restrictions hereinafter mentioned that is to say ; that I the said Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar have reserved to myself the right and power to cancel and revoke these presents and make any other deed or deeds therewith or deal with the said premises as I shall think fit and proper during my lifetime as if this deed had not been executed and that I have further reserved to myself the right of taking receiving and enjoying the rents profits issues and income of the said premises during my lifetime and after my death the same shall go to and be possessed by the said Arisie Marikar Hajdiar Mohamado Salih Hadjiar as his property provided however that the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar shall not sell mortgage gift exchange or otherwise dispose or alienate the said premises or any part thereof and further that he shall not be at liberty to encumber the rents profits income or issues of the said premises or suffer allow or subject the said premises or the rents profits issues and income thereof to be seized attached or sold by any writ of execution for any debt dues default or undertaking of the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar that he shall not lease the said premises for any term exceeding three years at a time nor execute any subsequent leases before the expiration of the lease then in existence for the said premises. Provided however that the said donee can make gifts to his daughters in their marriages but not to any other. Provided however that after the death of the said donee the said property shall devolve on his children as their absolute property and I do hereby for myself my heirs executors and administrators covenant promise and agree to and with the said Arisie Marikar Hadjiar Mohamado Salih Hadjiar his heirs executors administrators and assigns that the said premises hereby gifted are free from any incumbrance and that I and my aforewritten shall and will at all times hereafter warrant and defend the same unto him and his aforewritten against any person or persons whomsoever.

" And I the said donee do hereby thankfully accept the above gift made to me in the foregoing deed subject to the conditions therein set forth.

" In witness whereof we the said Ahamadoe Lebbe Marikar Arisie Marikar Hadjiar and Arisie Marikar Hadjiar Mohamado Salih Hadjiar do hereunto and to two others of the same

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tenor and date as these presents set our hands at Colombo on this eleventh day of March A.D. One thousand nine hundred and four."

The learned judges of the Supreme Court held that on the true construction of the deed the first part thereof was intended to create a gift inter vivos, that Mahomedan law must be applied thereto, and that by such law three conditions were necessary for a valid gift inter vivos—namely, expression by the donor of intent to give, acceptance by the donee express or implied, and the taking possession of the subject-matter of the gift actually or constructively by the donee. They further held that the premises in question were subject to a lease at the time of the deed of 1904, and that there was no evidence that the donee had possession, either actual or constructive, during the lifetime of the father. They therefore came to the conclusion that as the deed purported to create a gift inter vivos between Mahomedans, it was void under Mahomedan law.

It was argued on behalf of the plaintiff appellant that where such a deed as that under consideration involves a fidei commissum, the law by which the document is to be construed is the Roman-Dutch law, and that the whole of the document, and not one part of it only, is to be construed by Roman-Dutch law; that the principles of the Mahomedan law were to be implied only in the case of "pure" donations, as they were called, made by Muslems in Ceylon; in other words, to donations not involving fidei commissa.

"The common law of Ceylon is the Roman-Dutch law as it obtained in the Netherlands about the commencement of the last century": see *Karonchihamy* v. *Angohamy* (1), in which case Moncreiff A.C.J., in giving judgment in the year 1904, quoted a passage to this effect from Mr. Pereira's Laws of Ceylon, 1904 edition. Mr. Pereira, in his 1913 edition, while not doubting the law obtaining in Ceylon, has some hesitation in accepting the designation "common law" as being correct.

(1) 8 Ceylon N. L. R. 1, 8.

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There is no doubt, however, that the law adopted by the British Government in Ceylon in 1799 was practically the law which obtained in the Netherlands at the beginning of the last century. Under that law donations involving fidei commissa are well known and recognized as valid transactions.

The question therefore which arises in this appeal, in their Lordships' opinion, depends upon the construction of the deed of March 11, 1904.

It is true that in the first part of the deed the father purported to give, grant, assign, transfer, set over and assure to the son as a gift inter vivos absolute and irrevocable the land and premises. But in the habendum or second part of the deed it is made clear that the son was to hold the premises subject to the conditions and restrictions thereinafter mentioned, and the last paragraph in the deed shows that the son accepted the so-called gift subject to the conditions set forth in the deed.

The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift inter vivos according to the Mahomedan law. For, by the deed, the father reserved to himself the right to cancel and revoke the so-called gift, as if the deed had not been executed, and to deal with the premises as he thought fit; he reserved to himself the rents and profits of the premises during his lifetime, and it was only after his death that the premises were to go and be possessed by the son.

In their Lordships' opinion, all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the property in or the possession of the premises during his lifetime, or that the son should have any control over or possession of the premises during his father's lifetime. In other words, it was not intended that there should be a valid gift as understood in the Mahomedan law.

The deed further provided (among other things) that after the father's death, the son should not sell, mortgage or alienate the premises or any part thereof, that his powers of

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leasing the premises should be limited to granting leases for three years, and that apart from gifts which the son might make to his daughters on their marriage, the premises upon the death of the son should devolve upon the children of the son as their absolute property.

It was not disputed that the last mentioned provisions constituted a fidei commissum according to Roman-Dutch law, but, as already stated, it was contended, on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute a gift inter vivos between Muslims, Mahomedan law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the fidei commissum, which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent, and upon the true construction of the deed, having regard to all its terms, they are of opinion that the father did not intend to make to the son such a gift inter vivos as is recognized in Mahomedan law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor, but that the father intended to create and that he did create a valid fidei commissum such as is recognized by the Roman-Dutch law.

Their Lordships' attention was drawn to Ordinance No. 10 of 1931, which is entitled, " An ordinance to define the law relating to Muslim intestate succession, donations, and charitable trusts or wakfs," and in particular to ss. 3 and 4 thereof—which are as follows : " 3. For the purposes of avoiding and removing all doubts it is hereby declared that the law applicable to donations not involving fidei commissa, usufructs and trusts, and made by Muslims domiciled in the Island or owning immovable property in the Island, shall be the Muslim law governing the sect to which the donor belongs. Provided that no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed, and the delivery of the deed to the donee shall be accepted as evidence of delivery of possession of the movable or the immovable property donated by the deed. 4. It is hereby further

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declared that the principles of law prevailing in the maritime provinces shall apply to all donations, other than those to which the Muslim law is made applicable by section 3."

Their Lordships do not base their decision upon the provisions of the said Ordinance, because in their opinion the Ordinance cannot govern the present case, as it did not come into effect until June 17, 1931, and it cannot be said to be retrospective in effect. Their Lordships' conclusion, as intimated above, is based upon their opinion as to the true construction and effect of the deed of 1904 and the law then applicable thereto.

For the above mentioned reasons their Lordships are of opinion that the appeal should be allowed, the decree of the Supreme Court of Ceylon dated January 20, 1931, should be set aside, and the order of the District Judge of July 15, 1930, should be restored. The respondent must pay to the appellant his costs of this appeal and of the appeal to the Supreme Court, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Peacock & Goddard.*
Solicitor for respondent: *O. A. Cayley.*

[HOUSE OF LORDS.]

LLOYDS BANK, LIMITED . . . . APPELLANTS; H. L. (E.)*

AND 1932

E. B. SAVORY AND COMPANY . . . RESPONDENTS. Dec. 8.

Banker and Customer—Crossed Cheque—"Payee or Bearer"—Stolen Cheque—Receiving Payment for Customer—Negligence—Branch Credit System—Deficient Communication between Branches—Insufficient Inquiry—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 82.

It was the practice of bankers having a head office in London and various branch offices in London and elsewhere to accept at their head office cheques for the credit of an account at any one of their branch offices and to accept at any one of their branch offices cheques for the credit of an account at any other branch office.

A firm of London stockbrokers were in the habit of signing crossed cheques which were intended to be applied in payment of jobbers' accounts, and which in accordance with a rule of the London Stock Exchange were crossed and made payable to bearer. They had in their employment two clerks, P. and S. P. had an account at one country branch of the bank. The wife of S. had an account at another country branch. The manager of country branch No. 1 knew that P. was a stockbroker's clerk, but did not know and did not ask the name of his employers. The manager of country branch No. 2 knew nothing of S. Both P. and Mrs. S. had, when opening their accounts, given references which appeared satisfactory to the respective branch managers.

P. stole many of the cheques signed as above, and handed them in at one or other of the bankers' London branches, making out paying-in slips which represented that the cheques were paid in by the payees and directed payment to be made to the credit of P.'s account at country branch No. 1. S. also stole many of the cheques and handed them in at the bankers' head office, making out paying-in slips directing payment to be made to the account of Mrs. S. at country branch No. 2. The stolen cheques were in each case received by the London office and sent to the Clearing House. The paying-in slips were sent to the country branch, no mention being made of the names of the drawers. The amounts of the cheques were without question credited as directed by the paying-in slips.

Written rules formulated by the bankers for the direction of their managers provided, among other things, that no new current account should be opened without knowledge of, or full inquiry into, the circumstances and character of the customer; there was also a rule, not written but generally recognized, that banks do not take payments in, without inquiry, of cheques drawn by a firm in favour of a third party and paid in by a person, other than the payee, who is or ought to be known to be an employee of the drawing firm.

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

The stockbrokers sued the bankers for conversion of the stolen cheques. The bankers pleaded s. 82 of the Bills of Exchange Act, 1882, and alleged that they had in good faith and without negligence received payment of the cheques for their customers P. and Mrs. S.

Held, by Lord Buckmaster, Lord Warrington of Clyffe, and Lord Wright (Lord Blanesburgh and Lord Russell of Killowen dissenting), that the practice of the bankers was defective in that the branch which received the cheques in the first instance never informed the crediting branch of the names of the drawers of the cheques; and that the managers of the crediting branches had omitted to make sufficient inquiries when accepting P. and Mrs. S. as customers; that in these circumstances the bankers had failed to prove that they had acted without negligence, and consequently that they were liable.

First holding in *Morison* v. *London County and Westminster Bank* [1914] 3 K. B. 356 questioned.

Order of the Court of Appeal [1932] 2 K. B. 122 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing the judgment of Roche J. in favour of the defendants in an action brought against them by the present respondents. The facts, of which a summary follows, are stated in detail in the speeches of Lord Buckmaster and Lord Wright.

The appellants were bankers, having a Head Office in London and various branches in London and at Wallington, Redhill, Weybridge, and elsewhere in the country. For the convenience of their customers it was the practice of the bankers to accept at any one of their offices cheques for the credit of an account at any of their branch offices.

The bankers issued to the managers of their various branches a book containing the following rules:—

"29. No new current account should be opened without knowledge of, or full inquiry into, the circumstances and character of the customer. All parties connected with the account should sign the signature book, and, in the case of a firm, information should be obtained as to its constitution (whether a limited partnership or not) and, if accommodation is required, the balance-sheet (if possible, prepared by an accountant) should be seen. The reason for removing the account, if it is transferred from another branch, is a point worth noting, and all these particulars should be duly recorded in the private memorandum book."

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(1) [1932] 2 K. B. 122.

"36. No cheques or other documents made payable to a firm, company, or anyone in the capacity of a principal, should be accepted for credit of the private account of a partner, agent, or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority." . . . .

Another rule, not written, but generally acted upon, was that "Banks do not take payments in, without inquiry, of cheques drawn by a firm in favour of a third party and paid in by a person (other than the payee) who is known or ought to be known to be an employee of the drawing firm."

The respondents were stockbrokers on the London Stock Exchange. It was their custom to draw cheques in favour of jobbers, and by a rule of the Stock Exchange these cheques were made payable to bearer and crossed. They had in their employment two clerks named Perkins and Smith. Perkins had an account at the Wallington branch. Smith's wife had an account first at the Redhill branch and afterwards at the Weybridge branch.

The Bank officials at Wallington knew that Perkins was a stockbroker's clerk, but they did not know and did not ask the name of his employers. Neither at the Redhill branch nor at the Weybridge branch was any question asked of Mrs. Smith concerning her husband's occupation. Both Perkins and Mrs. Smith had, when opening their accounts, given references which appeared to the managers to be satisfactory.

Between March 25, 1924, and November 11, 1926, Perkins stole from the stockbrokers forty-three cheques of the total value of 2295*l.*, of which one was made payable to one Sly, another to one Frost, and the rest to one Davis. The one in favour of Sly was sent by Perkins by post to the manager of the Wallington branch. The others he handed in at the bankers' Monument or Threadneedle branch, merely making out a paying-in slip in the name of the payee and directing payment to be made to the credit of his own account at the Wallington branch.

Between November 25, 1926, and March 6, 1930, Smith stole forty-six cheques of the total value of 3717*l.* One was in the name of Davis, and was paid into the bankers' Threadneedle branch on a paying-in slip in the name of the payee; the rest were in favour of one Gibbes, and were all paid in at the bankers' Head Office, and in each case a paying-in slip was prepared in the name of Gibbes and directed payment to be made to the credit of Mrs. Smith at Redhill or Weybridge.

All the stolen cheques were collected by the bankers, and their proceeds were placed as to the first set to the credit of Perkins at Wallington, and as to the second set to the credit of Mrs. Smith at Redhill or Weybridge.

The stockbrokers sued the bankers for conversion of the stolen cheques. The bankers relied on s. 82 of the Bills of Exchange Act, 1882.

Roche J. held that the bankers had acted without negligence. It was not suggested that they had acted otherwise than with good faith. He therefore gave judgment for the defendants.

On appeal by the plaintiffs the Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) (1) held that the system under which cheques could be paid into one of the defendants' branches to be credited to a customer's account at another branch, without furnishing the officials of the latter branch with particulars of the cheques and the names of the drawers and payees, so as to enable those officials to inquire how the cheques came to be paid into the customer's account, was inherently defective; that therefore the defendants failed to prove that they had acted without negligence, and consequently that they were liable.

The defendants appealed.

Oct. 28, 31; Nov. 1, 3. *Wilfrid A. Greene K.C.* and *James Wylie* for the appellants. It must be conceded that the appellants have dealt with stolen cheques in a manner which would involve them in liability for conversion unless they can successfully invoke s. 82 of the Bills of Exchange

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(1) [1932] 2 K. B. 122.

Act, 1882 (1), and show that they received payment of the cheques for their customers without negligence. No imputation is cast on their good faith, and the only question is, have they been negligent. It is submitted that there was no evidence of negligence. Negligence in law means a breach of some duty to take care or exercise precaution, the care and precaution usually exercised in the business in which the person charged with negligence occupies himself; in the present case the business is that of bankers, and the standard of care to be observed is to be derived from the ordinary practice of bankers: *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (2), per Lord Dunedin.

For the last forty years bankers have accorded facilities to their customers by receiving at any branch of the bank cheques and sums of money to be placed to the credit of the customer's account at the branch where the account is kept. Cheques so paid in are sent to the Clearing House; the person paying in a cheque to the receiving branch—generally a customer of the branch where the account to be credited is kept—signs a credit slip, and this slip is sent by the receiving branch to the customer's branch; and on receipt of the slip the customer's account is immediately credited with the amount of the cheque. For forty years this has been the practice among all banks having branches, without any mishap having occurred until the event which led to this action.

The negligence with which the appellants are charged is (1.) that no steps were taken to inform the customer's branch of the names of the drawers of the cheques paid in to the receiving branch. But what authority is there for imposing a legal duty to impart any such information? And without a legal duty to do this, the omission to do it is not negligence in law. The only duty imposed by law in the circumstances in question is to take reasonable care to safeguard the interests of the true owner of any cheque received by the banker. All bankers take precaution in the interest of the true owners, and the means they adopt are to be found in the rules which the appellants issue to their managers, and especially rule 29. No new current account is opened without full inquiry into the circumstances and character of the customer. Almost every one who pays into one branch of a bank a cheque to the credit of an account at another branch must be a customer of the second branch and must have given satisfactory references before being accepted as a customer. It must be a rare occurrence when a complete stranger pays in a cheque to the credit of another person; but that event need not be considered, for it did not happen in the present case. Perkins was introduced to the appellants by a stockbroker's clerk who had been a customer of the appellants for four years and against whom nothing could be said. Perkins opened his account in September, 1923.

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(1) Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

(2) [1920] A. C. 683, 689.

Mrs. Smith opened an account at the appellants' Redhill branch on November 27, 1926. She was introduced by a Miss Stewart, who was already a customer of ten years' standing. On February 4, 1927, this account was transferred to the appellants' Weybridge branch.

It is submitted that so far no breach of duty can be laid to the charge of the appellants. When on March 26, 1924, the first stolen cheque was paid in at the Threadneedle branch and credited to W. H. Perkins' account at the Wallington branch, there was nothing in the circumstances to excite any suspicion whatever: see *Midland Bank* v. *Reckitt.* (1) And what applies to that cheque applies to the second, dated June 2, 1924, and to the subsequent cheques credited to the same account. Indeed, as time goes on, any possible reasons for misgiving lose their force: *Morison* v. *London County and Westminster Bank* (2); notwithstanding the comments of Scrutton and Sankey L.JJ.

(1) [1933] A. C. 1, 17.

(2) [1914] 3 K. B. 356, 377, 383.

upon that case in *Lloyds Bank* v. *Chartered Bank of India, Australia and China.* (1) Equally, in the case of the first cheque, dated November 27, 1926, paid in at the Threadneedle branch, and the second, dated September 13, 1926, paid in at the appellants' Head Office, both of which were credited to the account of Mrs. Dorothy Cowie Smith, at Redhill, there was nothing to put the appellants upon inquiry with regard to these or subsequent cheques paid in at the Head Office and credited to Mrs. Smith's account, whether at Redhill or Weybridge.

The respondents contend, and the Court of Appeal has upheld the contention, that before accepting Perkins as a customer the manager of the Wallington branch, on learning that he was a stockbroker's clerk, ought to have inquired who his employer was; and that before accepting Mrs. Smith as a customer the manager of the Redhill branch ought to have found out the nature of her husband's occupation and the name of his employers, if any; and that it was negligence on the part of the branch managers not to have made these inquiries. The duty to make them is based upon the rule 36, that no cheques made payable to a firm or any one in the capacity of a principal should be accepted for credit of a private account of a partner, agent or clerk without the principal's written authority. But the managers had no reason to suppose that Perkins would be paying in to his account, or that Mrs. Smith would be receiving, cheques drawn by a firm of which the Bank's customers were a clerk and the wife of a clerk. Are not such inquiries prompted by wisdom acquired after the event? Bankers are bound to act upon suspicious facts brought to their notice, but they are not bound to act as detectives, or to go in search of suspicious facts, or to ask questions of a would-be customer on the footing that he may be or become a thief; and they are not insurers of the probity of their customers. In numerous cases on the question of negligence within the meaning of s. 82, for example, *Bissell & Co.* v. *Fox Bros. & Co.* (2); *Hannan's*

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(1) [1929] 1 K. B. 40, 60, 74.

(2) (1884) 51 L. T. 663; (1885) 53 L. T. 193.

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Lake View Central v. *Armstrong* (1) (which may have led to the rule); *Bevan* v. *National Bank* (2); *Crumplin* v. *London Joint Stock Bank* (3); *Ladbroke & Co.* v. *Todd* (4); *Ross* v. *London County Westminster and Parr's Bank* (5), it has never been suggested that it was the duty of a bank manager to inquire of a person proposing to open account whether he has any and what employment and, if he has any, the name of his employers; unless, indeed, there is something in the opening of the account to raise doubt in the mind of the manager; for example, facts like those in *Hampstead Guardians* v. *Barclays Bank.* (6)

[*A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins* (7) was also cited.]

Schiller K.C. and *Philip Vos* for the respondents. The introduction of the Branch credit system, by which cheques are received at one branch for the credit of an account at another branch, has imposed upon bankers a duty to obtain more exact information than was formerly necessary concerning the position and circumstances of intending customers. The rules the appellants have made for the information and direction of their managers show that they are alive to certain risks to which they are exposed from the opportunities available to clerks and other servants of defrauding their employers. In the circumstances the appellants did not obtain sufficient information, and ought not to have been satisfied with the references they did obtain concerning either Perkins or Mrs. Smith.

Secondly, they admit the existence of a rule not to receive without inquiry cheques drawn by a firm in favour of a third party and paid in by a person who is not the payee and is or ought to be known to be an employee of the drawing firm; but their Branch credit process nullifies the rule. The receiving branch knows the name of the drawer of the cheque, but never imparts this knowledge to the crediting, or customer's, branch. Consequently the latter branch never knows the name of the drawer of the cheque, which nevertheless is credited to the customer's account. And even if the customer's branch did know the name of the drawer, it still does not know when the customer, or the customer's husband, as the case may be, is a clerk or other employee of the drawer, because the manager of that branch does not concern himself to inquire whether the customer, or the customer's husband, is in any one's employment. If proper inquiries were made about the employment of a would-be customer, or the employment of her husband if she is a married woman, the Bank as an entity would have all the requisite information to enable them to frustrate frauds like those which succeeded in the present case. All that would then be necessary would be for the receiving branch to inform the creditor's branch of the name of the drawer of the cheque. If this had been done the Wallington branch would have known that the respondents were the drawers of the cheques and that Perkins, their clerk, was paying in their cheques to the credit of his own account; and in those circumstances the frauds would never have been attempted. In short, the appellants' Branch credit system suffers from an inherent defect. They have the means of acquiring all the information which if applied would safeguard the drawers of cheques, but they omit to acquire it; and such information as they have they divide and distribute between their managers, so that one branch manager knows the name of the drawer and another branch manager knows the name of the clerk, but no one manager knows that the clerk is the clerk of the drawer. In these circumstances the appellants cannot be acquitted of negligence. Unless they can discharge the burden of proving absence of negligence they stand unprotected and are guilty of conversion of the cheques. If their Branch credit system involves a disregard of the rights of others they must renounce it or accept the risks they run in adopting it.

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(1) (1900) 5 Com. Cas. 188.
(2) (1906) 23 Times L. R. 65.
(3) (1913) 109 L. T. 856.
(4) (1914) 111 L. T. 43.
(5) [1919] 1 K. B. 678.
(6) (1923) 39 Times L. R. 229.
(7) [1924] 1 K. B. 775.

Wilfrid A. Greene in reply. The safeguards suggested by the respondents are ineffectual. A clerk may be in one firm's employment when he becomes a customer and in that of another firm when the question of his employment becomes material.

The House took time for consideration.

Dec. 8. LORD BUCKMASTER. My Lords, the facts of this case are simple, but the problem to which they give rise is not easy of solution.

Two men, W. H. Perkins and D. C. Smith, were clerks of the respondents, who are a firm of stockbrokers. Perkins had a banking account which he had opened at a branch of the appellants' Bank at Wallington on September 6, 1923, and Smith's wife had an account, opened on November 27, 1926, with a branch at Redhill, and transferred to Weybridge in February, 1927.

Between March, 1924, and November, 1926, Perkins stole from the respondents forty-three cheques, totalling in value 2295*l.* These cheques were all crossed bearer cheques in accordance with Rule No. 104 of the Stock Exchange, and were drawn by the respondents in favour as to one of a man named Sly, as to another of a man named Frost, and as to the rest of a man named Davis. They were consequently negotiable instruments which needed no indorsement and passed from hand to hand. The one in favour of Sly was sent by Perkins by post to the credit of his account at the Wallington branch; the rest of the cheques were paid in either to the appellants' Monument branch in London, or to their Threadneedle Street branch to the credit of Perkins' account at Wallington. The paying-in slip in each case purported to be signed by Davis, excepting the one in favour of Frost and the one in favour of Sly, in which case the paying-in slip was signed by Perkins. The claim in respect of the first nineteen of these cheques, amounting to 780*l.* 11*s.* 10*d.*, was admittedly barred by the Statute of Limitations. The judgment appealed from has excluded the claim to this extent.

Smith, between November, 1926, and March, 1930, stole forty-six similar cheques, totalling 3717*l.* One was in favour of Davis, and was paid into the appellants' Threadneedle Street branch on a paying-in slip signed in the name of Davis ; the rest were all payable in favour of one F. H. Gibbes, and these were all paid into the appellants' Head Office, and in each case a paying-in slip was prepared in the name of Gibbes. All the cheques were duly collected by the appellants, and their proceeds placed, as to the first set to the credit of Perkins at Wallington, and as to the others to the credit of Mrs. Smith at Redhill or Weybridge. The first of these cheques, for 78*l.* 15*s.*, was received before Mrs. Smith in fact became a customer, and in respect of this there was no defence.

The appellants claim repayment of the amounts of these cheques from the Bank, who rely in answer upon s. 82 of the Bills of Exchange Act, 1882, which is in the following terms :

" 82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." Apart from the section the appellants' liability is clear, for they have converted the cheques which were stolen from the respondents, and of which the respondents were the true owners.

The question therefore is whether, in the circumstances, the appellants received payment of the cheques without negligence, and the proof lies upon them. Roche J. held that the appellants had discharged this burden, but his judgment was reversed by the Court of Appeal.

The risk of banking accounts being used for dishonest purposes is well known and realized by the banks. The appellants have a book of rules designed to afford protection against this misuse of their facilities. Rules 29 and 36 are as follows :

" 29. No new current account should be opened without knowledge of, or full inquiry into, the circumstances " (whether employed or not) "and character, of the customer." . . . .

"36. No cheques or other documents made payable to a firm, company, or anyone in the capacity of a principal, should be accepted for credit of the private account of a partner, agent or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority." . . . .

There is also a rule, not reduced into writing but said to be a well known banking understanding, familiar to cashiers from their ordinary experience, the effect of which is stated in the evidence, in terms accepted by the appellants, as follows: "Banks do not take payments in, without inquiry, of cheques drawn by a firm in favour of a third party, and paid in by a person, other than the payee, who is known or ought to be known to be an employee of the drawing firm." These rules and statements are not a legal measure of the liability of a bank. They may fall short, or they may exceed what the Courts regard as their duty in a particular case, but they afford a very valuable criterion of obvious risks against which the banks think it is their duty to guard.

Now it appears that for many years there has been a practice among banks to receive cheques at one branch, which collects and transmits the proceeds to any defined credit at another branch. It was this practice of which Perkins and Smith availed themselves.

The evidence of the appellants is that at their London branches they did not know Perkins or Smith, that they did not know the payees or the people who signed the paying-in slips, and the appellants' accountant at first said that he did not know Messrs. Savory & Co., but this may have been due to a misunderstanding of the question, for he modified this statement in subsequent answers.

Dealing for the moment with Perkins alone, it is obvious that if the Wallington branch had known that Perkins was in the employment of Savory & Co., and that he was producing cheques for his own credit drawn by Savory & Co.

in favour of third persons, they would at once have become suspicious and have made inquiries before they carried the proceeds of the cheque to the credit of his account. It is, indeed, because this happened in regard to just such a transaction at Barclays Bank that the whole fraud was exposed. With regard to the cheque paid in direct, the very situation contemplated by their own rule would have arisen, to which the only suggested answer is that the signature of Savory & Co. might have been, though there is no proof whatever that it was, illegible.

If this be so, it follows that the system of receiving payments in by an unknown hand at another branch completely defeated the whole protection which the unwritten rule is designed to afford, for the branch that ultimately received the proceeds was only informed from the branch which collected the cheque by a slip that gives no information whatever as to the drawer's name or that of the payee of the cheque. In other words, if the unwritten rule represents, as I think it does, some measure of their prudent course in conducting business, then that prudence is completely neglected and ignored in cases where a branch, to which the customer is entirely strange, is used as a means of collecting the cheque. That this arrangement of business is of great convenience both to the customers and the banks may be accepted, but, conducted as it was in the present case, it neglects the necessity for that care which I think the banks have themselves formulated in their unwritten rule.

It is, however, urged that even at the Wallington branch no one would have known that Perkins was in fact an employee of Savory & Co., for, when the account was opened, though it was known that he was a stockbroker's clerk, no question had been asked as to who was the firm with which he was employed. Mr. Trotter, the appellants' witness, says that if a man were introduced to a bank manager as a stockbroker's clerk, the bank would get very little information without further inquiry. The following statement makes this plain :

MR. SCHILLER. Would it tell the bank manager much if a man was introduced and he said : " I am a stockbroker's clerk " ?—(A.) No, it would not.

(Q.) He would want to know the firm of stockbrokers he was clerk of ?—(A.) Possibly he would not ask the clerk, but the individual introducing may say : " He is with so and so."

(Q.) But he would want to know ?—(A.) Yes.

The same proposition is expressed by Mr. Butler, the manager of the branch at Wallington, in a similar form, and I regard the result of this evidence as meaning that a prudent bank manager, opening an account with a stockbroker's clerk, would ascertain who his employer was, unless the character of the reference was so satisfactory, or given by a customer so highly valued that the quality of the reference might be taken as dispensing with the need for the inquiry.

The evidence given upon that point seems to me plain. Mr. Trotter gave in answer to the judge the following statement :

(Q.) You have just told me that he would find it out and you meant he would, or ought to ask ?—(A.) We should ask, in the ordinary course, if he is a stockbroker's clerk, whom he is with, but if he is introduced by a respectable customer we should not bother any further.

(Q.) I can understand a careful manager not finding out if the rest of the reference was so satisfactory as to dispense with the necessity of making inquiries. That is your answer ?—(A.) That would be the sum of it.

And Mr. Butler, again in answer to the judge, says :

If I was told a person was a stockbroker's clerk I should not ask whom he was with if he was brought in by a customer whom I valued highly ?—(A.) That is so.

(Q.) But otherwise I should ?—(A.) Otherwise I should.

In the present case the reference that was taken was that of a customer who had banked with them for nearly four years, who was also a stockbroker's clerk. His account was subsequently closed, but when, the manager could not

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say, and it was not known with what firm he was a clerk. He played football, and his name was constantly in the local papers as a football player. There is no evidence whatever as to what he was asked or what information he gave. That was the whole of the reference which was taken as a substitute for inquiring with what firm Perkins was working. I cannot regard it as proved to be a reference of such value as to dispense with the primary necessity of making the inquiry.

Had all these cheques, therefore, as one of them was, been paid direct into the Wallington branch, I cannot think that the Bank would have acted prudently if they had received the cheques without inquiries. And if obedience to their own rules is necessary for the careful conduct of business, then, by their own conduct, they have made obedience impossible, and cannot escape from the consequences merely by saying that such conduct is in accordance with a convenient method of business.

The position with regard to Mrs. Smith stands on a different footing. It is not clear what are the customary inquiries that are made when a married woman opens an account. Assuming that she is treated in that respect as in exactly the same position as a man, some information ought to be obtained from her or from her reference as to her occupation, unless the character of the reference is such as to dispense with the necessity for such inquiry. She also may be an employee of a firm, and again, in the absence of special conditions the name of the firm should be known. If there is nothing whatever in the reference, or in information afforded, the Bank ought, in my opinion, to inquire as to the occupation of her husband, for it is obvious that the rules of the Bank, dictated by common prudence in the conduct of their business, can be entirely avoided if such knowledge is not obtained. In this case no information whatever was forthcoming. The manager of the Redhill branch knew nothing except that the landlady of the house she occupied said that the references given to her had proved sufficient to accept Mrs. Smith as a tenant, and I think there

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was a warning note in the statement made by the manager of the Redhill branch to the manager of the Weybridge branch stating "she is known to you." This was inaccurate; she was not known at Weybridge, and no information whatever was at any time obtained about her. Had it been known that her husband was a clerk in the employment of Savory & Co., and had the cheques which were paid into the London branch been paid into Weybridge, I think it would only be in compliance with the Bank's rules to have made inquiry before acceptance.

I appreciate the force of the argument that similar conditions must exist in regard to a daughter or a housekeeper, but that again must depend upon all the circumstances associated with their opening an account. We have to deal with the special case before us, and I do not think that proper care was exercised when this account was opened, and the lack of that care, coupled with the method of business adopted by the Bank has led to a loss arising from the very class of transaction that the banks themselves recognize as full of risk, and one against which safeguards are necessary.

I therefore think this appeal should be dismissed.

LORD BLANESBURGH. My Lords, it has become very clear, as the facts of this case disclose, that all unconsciously to the appellant Bank its Branch credit system as hitherto worked may have offered facilities to a dishonest customer to enlist the services of the Bank in obtaining for the credit of his account the proceeds of cheques which in fact he has stolen. Doubtless the disclosure of these facilities now made will lead the appellants and other multiple bankers to adopt for the future in relation to this system—one as convenient for their customers as it is doubtless advantageous to themselves—all further possible precautions and safeguards calculated to make the path of dishonesty in such matters less smooth and the success of wrongdoing more precarious. But it is remarkable after an experience of over forty years that these frauds are the first in which for his own ends the system has been utilized by a thief. And much might be made of this if the appellants were to be held entitled to invoke their system as an excuse for the fact that they were not put on any inquiry and for their consequential failure to detect the frauds which have here been perpetrated.

But in accord, I believe, with all your Lordships, I decline to put the appellants in that favoured position. In my judgment their liability in these proceedings must be determined altogether apart from the working of their system. From that system as such, in its every detail their own handiwork, they can claim no protection whatever.

So regarding the case, the critical question, much reduced as a result of the argument at your Lordships' Bar, is now, I think, no more than this: whether in the case of Perkins the appellants were negligent in that their manager at Wallington, when informed on his application to open an account that he was a stockbroker's clerk, made no inquiry as to the name of his employer; and whether in the case of Mrs. Smith they were negligent in that their manager at Redhill, before receiving her as a customer, refrained from inquiring, so that, in the result, both he and the appellants remained in ignorance, both as to the occupation of her husband, in fact also a stockbroker's clerk, and the name of his employers. Was the failure of the appellants, through their respective representatives, to obtain the information specified sufficient to deprive them in both cases, or in one, of the benefit of s. 82 of the Bills of Exchange Act, 1882?

My Lords, as the matter presents itself to my mind it is very necessary not to place this failure outside its proper perspective by dwelling upon the accident—for it is, I think, little more—that the employment as it was when each account was opened remained unchanged throughout its continuance. That circumstance in its relation to such frauds as those now in question is calculated to emphasize the relevance and to enhance the importance of the unasked question to an extent not admissible. For it is not suggested that the appellants would here have exposed themselves to any imputation of negligence if, having been given their name, they had refrained from making any inquiry of the employers as to the respectability of their clerk, or if, later, they had omitted to keep any record or otherwise to inform themselves of his employment for the time being. This being understood, and the admission was most candidly made by Mr. Schiller, it becomes to my mind clear that at least before the wider wisdom disclosed by these successful frauds had been acquired, inquiry as to the name of a customer's employer, when in fact it was made, had no reference at all to the possible perpetration of frauds within the reach of a clerk as such. It was neither designed nor in its imperfect range was it calculated to be a check upon these. Made, as according to the evidence the inquiry was made, only where the other references seemed to call for confirmation, its only purpose, I am satisfied, was to test the proposing customer's respectability by reference to the status and position of the employer who had so far trusted him as to receive him into his service—information whose value for that purpose was in no way lessened by a mere change in that employment subsequently effected—information, therefore, which called for no later inquiries on the subject—its end, when it was given, being fully attained.

Now as to Perkins, no real reflection was made at the trial upon the character and quality of his introduction, and in these circumstances it is not, I think, fair to the individual concerned to question in an appellate Court his complete responsibility. I prefer to accept the evidence of the banking experts that the bank manager in relation to his acceptance of Perkins as a customer acted as a prudent banker. I do not see why in this instance the law should require more from the appellants. I can here see no reason why the omission to make the inquiry of which so much has been made should be the touchstone of the appellants' duty in this case.

As to Mrs. Smith, the case is *a fortiori*. I find it difficult to see any negligence in relation to this matter in the Bank's failure to inform itself by inquiry as to the occupation of

Mrs. Smith's husband, so that, in an appropriate case, it might be followed by a further inquiry as to the name of his employer. In these days of emancipation when female clerks, married as well as single, abound, a decision to the contrary is in danger of being invoked as authority for the proposition that when a man known to be married applies to a bank to open an account, the bank is negligent if it refrains from making similar inquiry with reference to his wife—a proposition which still strikes me as extravagant.

With these additional reasons in support of it—if indeed they are additional—I find myself in accord with my noble and learned friend, Lord Russell of Killowen, whose opinion, about to be given, I have had the advantage of reading. With him, I would allow the appeal.

LORD WARRINGTON OF CLYFFE. My Lords, the question in this appeal is whether the appellants, who had prima facie become liable in damages for the conversion of certain cheques the property of and stolen from the respondents, and payment of which had been received by the appellants for customers, have proved that they received such payment without negligence so as to entitle them to the benefit of s. 82 of the Bills of Exchange Act, 1882. The judge (Roche J.) who tried the action decided the question in favour of the appellants, but his judgment was reversed by the Court of Appeal (Scrutton, Lawrence and Greer L.JJ.). (1) I have read and considered the opinions of my noble and learned friend on the Woolsack and that about to be read by Lord Wright, and I do not propose to state over again the detailed facts but to express as shortly as I can the conclusion at which I arrive and the reasons for it.

The cheques in question were, in accordance with the rules of the Stock Exchange, made payable to payee or bearer and crossed generally. The payee in each case was a person with whom the respondents had dealings on the Stock Exchange. The cheques were signed in blank, the name of the payee and the amount being filled in afterwards.

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(1) [1932] 2 K. B. 122.

The appellants, in common with many other banking companies, have adopted the practice—a very convenient one for their country customers—of receiving at any of their offices in the City cheques for the credit of customers at country branches, and collecting the amounts through the Clearing House, and then transmitting them to the country branch for the credit of the customers concerned.

The cheques in question were stolen from the respondents by two of their clerks, one named Perkins and the other named Smith.

Perkins had an account at the appellants' branch at Wallington, to which the amounts of forty-three of the stolen cheques were credited between March 26, 1924, and November 16, 1926. These cheques, with one exception, were collected, some at the Monument branch and the rest (the great majority) at Threadneedle Street, in accordance with above practice. The one exception was a cheque sent by Perkins himself to Wallington. The paying-in slip in each case purported to be signed by the drawee, and stated in effect that the amount of the cheque was for the credit of the account of Perkins at Wallington.

In Smith's case the facts differed from those in the case of Perkins, in that the amounts were collected for the credit of his wife's account, first at Redhill and afterwards at Weybridge. In other respects the method adopted was substantially the same as in the other case. The number collected for the credit of Mrs. Smith's account was forty-five, and they were collected between November 27, 1926, and July 3, 1929. Thus the transactions in Mrs. Smith's case began shortly after those in Perkins' case came to an end.

Perkins was in the employ of the respondents and was known by the appellants to be a stockbroker's clerk, but they did not inquire and did not know the name of his employer.

The account in the case of Mrs. Smith was opened in her own name. She was described in the appellants' records as the wife of David Smith, but the appellants did not inquire as to, and did not know, the nature of his employment.

Except so far, if at all, as there was anything in the nature of the credits above mentioned to arouse the suspicions of the appellants, there was nothing in the way the accounts were used to indicate any impropriety on the part either of Perkins or of Mrs. Smith or her husband.

It is contended on behalf of the respondents that the appellants have failed to prove that they were not negligent, for one reason at all events—namely, that in the case of Perkins they did not inquire who were his employers, and in the case of Mrs. Smith they made no inquiry at all as to the nature of her husband's occupation. If this contention is well founded it will dispose of the appeal.

There is here no special duty, contractual or otherwise, towards the true owners of the cheques. The standard by which the absence, or otherwise, of negligence is to be determined must in my opinion be ascertained by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and others against fraud.

With regard to the particular point with which I am now dealing, the appellants themselves have laid down a rule for the guidance of their officers which is a clear indication of the importance they attach to caution in the opening of new accounts. I refer to rule 29: "No new current account shall be opened without knowledge of or full inquiry into the circumstances and character of the customer." There is also the rule, referred to in the arguments as the unwritten rule, and stated by the learned trial judge to be that "Bankers do not take payments in without inquiry of cheques drawn by a firm in favour of a third party and paid in by a person other than the payee who is known to be an employee of the drawing firm." This rule indicates in my opinion that bankers recognize the possibility of frauds such as those now in question being perpetrated by an employee of the drawer of a cheque.

I have carefully read and considered the evidence as to the practice of bankers when applied to by a person who is in employment such as that of Perkins and Smith, and I am satisfied that it comes to this, that it is usual to inquire the name of the employer, unless there is such a thoroughly satisfactory reference as to make such an inquiry superfluous.

First, to take the case of Perkins. The manager at Wallington knew that he was a stockbroker's clerk and he made no inquiry as to his employers. The only reference he had was from a customer who was also a stockbroker's clerk, but in whose employment the manager did not know, and as to the particulars of the reference all he says is that "he (Perkins) was respectably introduced." I cannot think that in accepting such an introduction without making the inquiry in question or in fact any other inquiry the manager was either complying with rule 29 or taking any reasonable precaution to avoid in Perkins' case an infringement of the "unwritten rule." In his case, therefore, I agree that the appellants have failed to prove that they acted without negligence.

In the case of Mrs. Smith somewhat different circumstances have to be considered. The reference in this case was to a customer, the landlady of the house in which Mrs. Smith lived. All the manager says was that Mrs. Smith was respectably introduced and he accepted her as a customer, saying "she looked respectable." He seems to have made some inquiry of the introducer, and was told that on becoming her tenant Mrs. Smith had produced references which she regarded as satisfactory. He had no information whatever as to her husband's employment. On the occasion of the transfer of her account to Weybridge, the manager at Redhill informed the manager at Weybridge that she was respectably introduced but he had no knowledge of her means, adding "she is known to you." The manager at Weybridge said he made no further inquiry either as to her or her husband. Apparently the statement, "she is known to you," was not in accordance with the facts.

But for the fact that Mrs. Smith was a married woman I can see no distinction between this case and that of

Perkins. It is true that married women now frequently have separate banking accounts, but this fact by itself does not in my opinion relieve a bank from making such inquiries as in the particular case may seem reasonably necessary. Here the two managers made practically no inquiries at all. It cannot be said that either of them either had knowledge of or had made full inquiry into the circumstances of the proposed customer. In my opinion, therefore, in the case of Mrs. Smith, as well as in the case of Perkins, the appellants have failed to prove that they dealt with the cheques in question without negligence, and I agree that the appeal ought to be dismissed with costs.

I only wish to add this. The practice of receiving cheques for collection at a branch other than that of the customer does, I think, tend to make the commission of such frauds as those here in question easier owing to the division of knowledge between the two branches. The customer's branch has, or ought to have, some knowledge of the circumstances of the customer. The receiving branch has no such knowledge. On the other hand, the customer's branch does not see the cheque and has no knowledge as to the drawer, whereas the receiving branch sees and deals with the cheque and has, or ought to have, such knowledge. I think it is desirable in the interests of the banks generally, and of the appellants in particular, that they should carefully consider how, if at all, they can amend their procedure with a view to meeting the risk disclosed in the present case. This is a matter proper to be dealt with by the banks themselves, and I do not venture to make any concrete suggestions on the subject.

LORD RUSSELL OF KILLOWEN. My Lords, in receiving payment of the cheques here in question for their customers who had no title thereto the Bank incurred a liability to the respondents, the true owners of the cheques, unless they can show that they received such payment in good faith and without negligence. That, as I read it, is the effect of s. 82 of the Bills of Exchange Act, 1882. It is not suggested that the payments were received otherwise than in good faith. The sole question is whether they were received without negligence.

I will deal with the cases of the customers Perkins and Mrs. Smith separately, but before doing so I would state that I agree with the view that if the Bank were negligent in that the manager of the branch at which the relevant account was opened did not ascertain the name of the employers of Perkins or of Mrs. Smith's husband, as the case may be, the Bank can gain no protection from what has been called the Branch credit system, under which (as operated) the customer's branch knows nothing of the name of either the drawer or the payee of the cheque, the proceeds of which are there placed to the customer's credit. If it was the duty of the manager of the customer's branch to know the name of the customer's employer and of the employer of the customer's husband, it would be negligence in the Bank to receive payment of the employers' cheque under a system which kept from the manager of the customer's branch knowledge of the facts that the cheque credited was a cheque of the employer drawn in favour of some one other than the customer. I will therefore deal with the case upon the footing that the cheques were paid directly into the customer's branch, without the intervention of the Branch credit system.

I need not go through the facts as to Perkins, save to state that with three exceptions all the cheques were paid in on paying-in slips purporting to be signed by the payee of the cheque. The three exceptions are two cheques which were paid in on paying-in slips on which the name of the payer-in was stated to be Perkins, and one cheque which Perkins enclosed in a letter to the manager of the Wallington branch requesting that it be credited to his account.

The evidence in the case establishes clearly to my mind that in fact no one in the Bank knew that Perkins was in the employ of Savory & Co. The Wallington branch knew that he was a stockbroker's clerk, they knew nothing of

Savory & Co. How, in these circumstances, is the Bank said to be negligent in collecting the amount of these cheques ? It is said that the Bank, knowing that their proposed customer was a stockbroker's clerk, were bound to ask for the name of his employer. This obligation is said to arise from the knowledge that a risk exists of servants stealing the cheques of their employers and paying them into their own accounts. That such a risk exists no one can deny, and it appears from the evidence that banks make it a rule not to take payment without inquiry of cheques drawn by a firm in favour of a third party and paid in by a person, other than the payee, who is known to be an employee of the drawing firm. This has been referrred to as the "unwritten rule." It seems, however, a very long step to take to say that, because if banks know that a customer is employed by a firm, whose cheque in favour of a third party he is paying in to his own credit, they should make inquiries before receiving payment of it, therefore banks are bound at the outset to ascertain the names of their customer's employers and are guilty of negligence if they do not.

I know of no authority before the present case justifying that proposition, and I can conceive no logical basis on which one can rest an obligation on A. to make an inquiry for the purpose of regulating and guiding his future action during an indefinite period of time, the answer to which may cease to be correct immediately after it is given.

There are many cases in the books where a bank has converted and has not escaped liability under the provisions of s. 82, the cheque in question being a cheque drawn either by a firm or in favour of a firm and paid into his own account by an employee, but in all such cases the bank either in fact knew of the relationship beforehand, or the relationship was apparent upon the face of the cheque. I know of no case, and none was cited to us, in which it has been held that a bank which did not in fact know was liable upon the footing of negligence in not making the initial inquiry.

In my opinion such a duty is not, and ought not to be, imposed upon banks. They must make sufficient inquiries to satisfy themselves of the integrity of the proposed customer and of the desirability of having his account on their books, but I see no justification for adding to this the burden of making inquiries as to the names of his employers and, I presume, verifying the answers.

I agree with the view that, apart from this alleged negligence by omission to inquire the name of Perkins' employers, there were no circumstances calculated to arouse suspicion in the Bank's mind, so as to found a charge of negligence by the omission to make other and subsequent inquiries, and I fail to see that his references were otherwise than sufficient and satisfactory. He was introduced by a householder at Wallington, an old customer of the Bank, whose account, transferred from another branch to Wallington, had been in the Wallington books some four years. I would emphasize these features of his introducer rather than (as did Scrutton L.J.) his skill on the football field.

My opinion, therefore, is that as regards the Perkins cheques this appeal should succeed upon the ground that the appellants are relieved from liability by s. 82.

In the case of the Mrs. Smith cheques, the same result should follow. As to the alleged negligence in not inquiring the name of her husband's employer, this is an a fortiori case. Nor do I find here any reason for imputing negligence to the Bank based upon other grounds.

LORD WRIGHT. My Lords, the appellants, Lloyds Bank, Ld., who were defendants in the action, are appealing from a decision of the Court of Appeal, reversing a judgment of Roche J. in their favour, and holding them liable in damages for the conversion of certain cheques the property of the respondents, the plaintiffs, who are a firm of stockbrokers in the City of London. The respondents had at all material time in their employment as clerks two men, named Perkins and Smith, who stole cheques drawn by the respondents; these cheques were collected by the appellants. The frauds fall under two main classes, those connected with the name of Perkins and those connected with the name of Smith. It is necessary to consider the two classes separately.

In 1923 William Harry Perkins was in the respondents' employment as a stockbroker's clerk; he resided at Wallington. On September 6, 1923, he opened an account at the Wallington branch of the appellants. In the introduction book his address is given, he is described as stockbroker's clerk and as having been introduced by Mr. A. S. Sitch, who was a customer of the same branch, was also a stockbroker's clerk, was considered respectable, and was known locally as a football player. Perkins was not asked and did not state the name of his employers. Into that account there were paid in for collection forty-three cheques stolen from the respondents, of an aggregate value of 2295*l.* 12*s.* 8*d.* All the cheques were crossed and, in accordance with the Stock Exchange rule, were drawn to a named payee or bearer. The first was paid in March, 1924, the last on November 16, 1926; the account was seldom in debit and then only for a few pounds or shillings for a day or so, though occasionally the credit balances were small. About 200*l.* had been paid in and drawn out before the first of the stolen cheques, and from time to time afterwards other credits often comparable in amount to the stolen cheques were paid in. On August 11, 1924, a cheque was sent by Perkins direct to the Wallington branch for collection; it was drawn by the respondents payable to A. H. Sly (a stock jobber) or bearer, and was for 45*l.* 17*s.* 6*d.* The cheque was collected in the ordinary course and credited to Perkins. Of the remainder two were paid in by Perkins into the appellants' Monument branch in the City on a paying-in slip signed by himself, the one being in favour of Nevill or N. Frost or bearer, the other in favour of W. P. Davis or bearer. The remainder were made payable to W. P. Davis or bearer, and with the exception of five were paid in to the appellants' Threadneedle branch; of the five, four were paid into the appellants' Monument branch and one into their City office. Sly, N. Frost and W. P. Davis were stock-brokers or jobbers, but though in each case, except the three first mentioned, the paying-in slip bore on its face what purported to be the signature of the named payees, it is admitted that these parties had no concern with the cheques and quoad the cheques were fictitious. There is no evidence who personally presented at the appellants' branches the cheques and paying-in slips. The cheques, being Town cheques drawn on the Threadneedle branch of the Midland Bank, were cleared in each case on the same day as paid in, and on the same day the respective City branches transmitted to the Wallington branch the paying-in slip, which in accordance with usual practice gave no information of the drawer's name, nor did the appellants keep any record of that.

That the documents in question were cheques and were, when handled by the appellants, the property of the respondents, was rightly not disputed by the appellants in the facts of the case: it was also rightly conceded by the appellants that what they did constituted a conversion by them of the cheques for which the appellants, in the absence of special defences, were liable in damages in the amounts of the face values of the cheques. As to certain of the earlier cheques, the Statute of Limitations has been successfully pleaded by the appellants and no question arises as to that before this House. As to the residue, save one cheque which was collected for Mrs. Smith before she became a customer, the appellants claim that they are freed from liability under s. 82 of the Bills of Exchange Act, 1882, as amended by the Bills of Exchange (Crossed Cheques) Act, 1906. The appellants are not claiming to be holders in due course, which would raise a different issue from the issue under s. 82; their position is that they were collecting the cheques for customers. The good faith of the appellants is not impugned. The only question is whether they establish that they handled the cheques without negligence. Unless the appellants can establish that they acted without negligence, they, like other bankers in a similar position, are responsible in damages for conversion if their customers had no title or a defective title. In an ordinary action in conversion, once the true owner proves his title and the act of taking by the defendants, absence of negligence or of intention or knowledge are alike immaterial as defences. Sect. 82 is therefore not the imposition of a new burden or duty on the collecting banker, but is a concession affording him the means of avoiding a liability in conversion to which otherwise there would be no defence. As it is for the banker to show that he is entitled to this defence, the onus is on him to disprove negligence. And just as in an action in conversion it is an immaterial averment that the conversion was only possible because of want of ordinary prudence on the part of the true owner, so that averment is equally immaterial if the issue arises under s. 82.

As the defence of the section is invoked against the true owner, it is as against him that the absence of negligence is to be proved, and hence the case is put as a duty towards the true owner. But in the vast majority of cases the true owner is the customer. That the true owner is someone else is generally not apparent until the act of conversion has been done and the claim is made. A banker can safely assume that most cheques which he receives for collection are honestly come by, but as the risk of converting cheques in the course of collection cannot be eliminated there are certain well recognized circumstances which should put the banker on his guard, and there are certain well known precautions which a banker should adopt in connection with a customer's account. The most obvious circumstances which should put the banker on his guard (apart from manifest irregularities in the indorsement and such like) are where a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it, as for instance where a customer known to be a servant or agent pays in for collection a cheque drawn by third parties in favour of his employer or principal. Such a case carries even a clearer warning if the cheque is indorsed per pro. the employer or principal by the servant or agent. Such cases are illustrated by *Bissell* v. *Fox* (1) and other authorities,

(1) 53 L. T. 193.

of which I may refer to *Lloyds Bank* v. *Chartered Bank of India, Australia and China.* (1) Similarly if a cheque payable to a one-man company is paid in by the " one man," who is also managing director, to his private account : *A. L. Underwood, Ld.* v. *Bank of Liverpool and Martins.* (2) A second type of case is where a servant steals cheques drawn by his employers and pays them or procures their payment into his own account. Such a case is illustrated by *Morison* v. *London County and Westminster Bank.* (3) In all these cases the cheque in itself, apart from knowledge possessed of the customer's position, indicates a possibility or even probability that the servant or agent may have misappropriated it and hence the bank may be converting it. Both these risks are well known to bankers, as the evidence in this case shows : the former class is the subject of a special printed rule of the appellants addressed to their employees, warning them not to take without the principal's written authority cheques or other documents payable to a firm, company, or any one in the capacity of a principal, to the credit of the private account of a partner, agent, clerk or other person closely connected with the principal. And as to the latter class, the evidence was that the risk was so well and indeed intuitively understood by the appellants' employees as not to need a written rule that they must not take without inquiry cheques drawn by a firm in favour of a third party, and paid in by or for the credit of a person, other than the payee, who is known or ought to be known to be an employee of the drawing firm. These words " ought to be known " have reference to another aspect of the care that should be taken by the collecting banker, that is to acquaint himself with his customer's position, so as, in proper cases, to be able to guard against the risk. It is true that the question of absence of negligence must be considered separately in regard to each cheque, but it is also true that the matter must be considered, as Lord Dunedin says in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (4), in view also of all the circumstances antecedent and present. There may thus be relevant negligence in connection with the opening of the customer's account by the banker. It is now recognized to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under s. 82 if a cheque were converted subsequently in the history of the account: this rule was applied by Bailhache J. in *Ladbroke* v. *Todd* (1), who on that ground held that the banker had not made out his defence under s. 82. The matter is now so well appreciated by bankers that the appellants have a printed rule saying that no new current account is to be opened without knowledge of or full inquiry into the circumstances and character of the customer. The crucial question which arises in connection with that part of this action which deals with the cheques collected for Perkins is whether on opening his account the appellants did not neglect a proper precaution—that, knowing him to be a stockbroker's clerk, they did not inquire who his employers were, and are therefore guilty of negligence within the meaning of s. 82. In my judgment they were.

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(1) [1929] 1 K. B. 40.

(2) [1924] 1 K. B. 775.

(3) [1914] 3 K. B. 356.

(4) [1920] A. C. 683, 689.

I think, agreeing herein with the unanimous opinion of the Lords Justices, and I think also of Roche J., on this point, that at least where the new customer is employed in some position which involves his handling, and having the opportunity of stealing, his employers' cheques, the bankers fail in taking adequate precautions if they do not ask the name of his employers, and fail even in carrying out the rule which I have just quoted, because they fail to ascertain a most relevant fact as to the intending customer's circumstances. This is specially true of a stockbroker's clerk; it may be different in the case of an employee whose work does not involve such opportunities, as, for instance, a technical employee in a factory. But in the case of a stockbroker's clerk or other similar employment, the bank are dealing

(1) 111 L. T. 43.

with something which involves a risk fully known to them. That rule of the bank gives, in my judgment, the measure of what the bank in opening such an account ought to do: it points the meaning of the phrase "who is known or ought to be known to be an employee of the drawing firm." It is clear that they ask information as to the man's occupation, and if they find that he is (for instance) a stockbroker's clerk, they surely should go on and ask who his employers are, since otherwise they cannot guard against the danger, fully known to them, of his paying in cheques stolen from his employers.

It is argued that this is not the ordinary practice of bankers, and that a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking. But as to the actual practice of banks in such cases, I am far from satisfied from the evidence in this case that it is not the usual practice. One of the banking experts, Mr. McGibney, of Barclays Bank, said that in the case supposed they would not always ask the employer's name, "but it is usual to ask that question for what it is worth," though he adds, "We always have an introduction." Mr. Butler, of the National Provincial Bank, said they would not "necessarily ask the employer's name," if there was an introduction sufficiently strong, "if the surrounding circumstances made him appear to be quite a substantial man." Mr. Trott, of the appellant Bank, after apparently conceding that the manager would want to know the firm by whom the stockbroker's clerk was employed, said: "We should ask in the ordinary course, if he is a stockbroker's clerk, whom he is with, but if he is introduced by a respectable customer we should not bother any further." The inference I draw from the evidence is that bankers do recognize the importance of ascertaining when opening an account for a stockbroker's clerk (or one in similar employment) who his employers are, simply in order to be on guard against the known risk in such a case of their converting stolen cheques. The onus throughout in these cases is on the banker to establish that he was not negligent, and in so far as reliance is placed on it being the usual practice of bankers not to ask the name of the employer, I do not think the appellants have here established that allegation. This very obvious piece of information, which could be obtained easily and without reflecting in any way on the customer, enables them to avoid the danger: all the cashier, with this information, has to do is in the case of each cheque to look at the drawer's name. The idea that the Bank can justify under s. 82 their failure to do this, simply because they have a good reference —if indeed that idea be really held—appears to me to involve a confusion of ideas. Such a reference or introduction merely speaks to the general reputation of the man: knowledge of who are his employers is aimed at an entirely different purpose, that is to arm the Bank against the known, even if problematical, risk: it is unfortunately common knowledge that persons of respectability, well introduced, may still commit frauds. The reference may be fairly regarded as very sketchy in this case, and I think it was far from enough to dispense the manager from "bothering" any further. Nor is it any reason why this information should not be obtained that the man may give a false answer or may thereafter change his employment. The former is not likely; as to the latter, in the present case there was no change in Perkins' employment, and it is useless to consider what might be the position if something had happened which did not happen. Nor is it any answer to a charge under s. 82 of neglecting a proper precaution, that if it had been taken it might have been fruitless. Nor does a precaution cease to be proper for purposes of s. 82 merely because, though generally effective, it may in special circumstances be ineffectual.

In each case negligence must be a question of fact in the particular circumstances, which may modify the general rule. In such a case, however, as that of Perkins I do not find any special circumstances to modify the rule, or justify the appellants in not seeking the information obviously proper. If I am right in my conclusion that the Bank were at fault in not asking and noting the name of Perkins' employers when they opened his account, then liability follows in regard to the Perkins cheques, except in so far as the appellants are saved by the Statute of Limitations, and subject to my considering a further point which now calls for consideration.

Before I deal with that, I may observe that one of the cheques, that paid in on August 11, 1924, was sent to the Wallington branch direct by post, and therefore if the manager or cashier had known, as I think he ought, the name of his customer's employers, he would on the face of the cheque have had all the information which, according to the admitted practice of the Bank and the clear law, would have put him on inquiry and led to the fraud being detected at that early stage. The only answer to such a position which is attempted is that the respondents' signature might have been indecipherable, but it is for the appellants to make out their defence and to prove that they could not read the signature. They cannot do so, and it follows, in my judgment, in view of my conclusion that the employers' name ought to have been known to them, that the appellants fail on that cheque, and in consequence on all the Perkins cheques that follow, because if they had made proper inquiries about that cheque they would in all human probability have stopped the fraud. The least they could have done would have been to inquire of the respondents about the correctness of the cheque.

It is, however, necessary to deal with a further point as to the remainder of the cheques; there is a complication by reason that they were paid in at City offices of the Bank for immediate clearance as Town cheques: all the information then sent to the Wallington branch was the name of the account to be credited, of the payer-in and the amount. Banks keep no record of drawers' names. Under that system the fraud would not have been detected even if the Wallington branch had known the name of Perkins' employers, because they would never have known who drew the cheque. The system involves a division of knowledge, which in fact necessarily prevents the Bank from detecting any such fraud as the present. This system has been invoked by both sides: by the respondents as constituting a separate head of negligence, by the appellants as excusing them for failure to be put on inquiry or to detect the fraud. In my judgment, as a matter of law, the system can in this case be disregarded, because I hold that the Bank cannot in virtue of that system which it voluntarily adopts, no doubt for general convenience and in the general interest of its customers, put itself in any better position than if the cheques had all been paid into the one branch: the Bank cannot in that way claim to have split up its knowledge.

The appellants, however, strenuously contended that the system is very convenient, as it clearly is, because it enables cheques to be cleared and credited without delays of post; they also contended that it has been in use for forty years or more and, so far as the three witnesses called as experts in banking know, had never involved trouble; and they claimed that they were free from liability simply on the ground that, even if the name of Perkins' employers had been known at the Wallington branch, the fraud could not have been detected, because the branch which knew the drawer's name did not know the customer's name, and equally the branch which knew the customer's name did not know the drawer's name; and they claim that this regrettable consequence resulted from their following the ordinary practice of bankers, sanctified by long and successful usage. I do not think this is a sound argument. The practice, on its very face, is inconsistent with provident precautions against a known risk, and the mere fact that it is usual and long established is not a sufficient justification. It cannot be justified as an excuse simply because in the past by good fortune no harm seems to have happened. But for reasons already stated, I regard it as not material in this case: otherwise I should regard it as a separate head of negligence.

I may add that the number of the stolen cheques, and the period of time over which they were spread, afford no justification to the appellants. Each time they collected one of these cheques they were converting it unless they could bring themselves within s. 82; each time the original fault in not knowing the name of Perkins' employers operated to deprive them of the protection of the section. The appellants have claimed that the repetition of cheques, all of which were dealt with before any objection was raised by the appellants, "lulled them to sleep"; and they rely on *Morison's* case. (1) I find it difficult to appreciate on what principle that case was decided in regard to this point; it can only be justified, if at all, on its special facts. In any case, no one from the Bank came to say he was "lulled to sleep," or, indeed, had given his mind to the question at all, if, contrary to my opinion, such questions are relevant.

In my judgment on this part of the case, for the reaons I have given, I think the appeal fails.

The case of the forty-six cheques collected by the appellants for the account of Mrs. Smith now calls for separate consideration. These cheques were all drawn by the respondents, they were crossed, they purported to be in favour of F. H. Gibbes or bearer, except the first which was in favour of W. P. Davis, according to its tenor; they were Town cheques and were all paid in for collection at the appellants' Threadneedle Street branch under paying-in slips, signed apparently as to the first by W. P. Davis, and as to the remainder by F. H. Gibbes, and were to be collected for the credit of Mrs. Dorothy Cowie Smith, and were dealt with by the appellants in accordance with the same general system. As to the first five, they were credited to the appellants' Redhill branch, and as to the remainder at the appellants' Weybridge branch. The last of the Perkins cheques was paid in on November 11, 1926, and the first of the Smith cheques on November 28, 1926. It seems a fair inference that Perkins and Smith were confederates in the fraud, but there is no direct evidence of their association. Nor is there any evidence why the change was made. What I have said about the general system of paying in at a City branch for clearance there and crediting at the customer's country branch applies equally to this part of the case, but there is the distinguishing feature that the customer here was not the stockbroker's clerk Smith, but his wife, Mrs. D. Cowie Smith. Obviously neither the Redhill branch nor the Weybridge branch knew anything about the Perkins transactions. On November 26, 1926, the first of these cheques was paid in by some one unknown at the branch in the City along with a paying-in slip purporting to be signed by W. P. Davis. According to instruction it was cleared the same day and the paying-in slip sent to Redhill branch, where it was received on November 27, 1926. On that same day Mrs. Smith came to the Redhill branch, saw the manager, asked to open an account, and gave as reference a Miss Stewart, who had been customer of the branch for ten or twelve years. Miss Stewart was Mrs. Smith's landlady; the house in question was quite small. Miss Stewart was not asked what means Mrs. Smith had; all the information she could or did give was that Mrs. Smith had given satisfactory references when she took the house. The manager was satisfied; he took her signature and address and entered her as wife of David Smith under the head of occupation. It appeared that she had no banking account previously. The manager made no further inquiries about her circumstances or character. He said in evidence that she looked respectable. As to this first cheque, it is clear that it was collected on November 26, 1926, the day before she became a customer, and therefore the appellants admittedly cannot claim to be protected by s. 82. Four further cheques were collected and credited to the Redhill branch. Then on February 8, 1927, the account was transferred to the Weybridge branch of the appellants; the manager, without any inquiries of his own, accepted the transfer of the account, although the notice from the Redhill manager of the transfer stated that Mrs. Smith was known to the Weybridge manager. He, though he knew nothing about her and, indeed, never saw her, asked no questions of anybody. The account continued till March 19, 1930, the last cheque being credited on March 7, 1930. Except the forty-six cheques there were no other payments into her account.

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(1) [1914] 3 K. B. 356.

In my opinion, the appellants were guilty of negligence within s. 82, or at least have not proved that they were not negligent, and cannot claim the protection of the section in regard to the cheques collected for Mrs. Smith. For the reasons I have already discussed I shall treat the case as if the whole of the transaction in regard to the opening of the account had taken place at the Redhill branch. On that assumption, the position would be that a stranger came to the branch with the cheque payable to W. P. Davis or bearer, signed a paying-in slip as W. P. Davis, as for the account of Mrs. Smith, who was not a customer; the appellant Bank knew nothing about W. P. Davis, or whether the man who came was W. P. Davis, or about Mrs. Smith. The cheque was obviously a business cheque. It was, however, collected without any inquiries, and when Mrs. Smith in due course appeared, was put to her account under the circumstances I have stated. I cannot hold that this was the conduct of "a careful banker," if I may adopt the phrase of Greer L.J. The appellants, in one of their emphatic warnings to their officials about the importance of guarding against the risk of converting cheques, say "That what goes into an account calls for as much careful scrutiny as what goes out." I do not press this statement too far, but it has significance. It is true that in any case the appellants are admittedly liable on this cheque, as they collected it before Mrs. Smith was their customer. But I am dealing with it as in connection with the opening of the account. Even apart from the peculiar nature of the cheque paid in and the manner in which it was paid in, I think the appellants' manager opened the account "without knowledge of or full inquiry into the circumstances and character of the customer," to quote again the appellants' own rule—and simply on that ground the appellants cannot be acquitted of negligence in opening the account; a fortiori, when regard is had to the peculiar circumstances here. So to hold is not to impose on the appellants the duty of being amateur detectives, or of making unnecessary or impertinent inquiries, nor to judge their acts in the light of what has since become known. If it is said that the Redhill manager cannot be treated as knowing what had happened at the Threadneedle Street branch, where the cheque was actually paid in, then, though it is true he cannot to that extent be blamed, what is in question is not whether he was personally negligent but whether the appellants were negligent. I do not repeat what I have already said on the question of the general system of receiving cheques for clearance in the City to be credited at country branches. Their knowledge must, I think, be treated notionally as single and undivided for present purposes. I do not wish to lay down any general rules as to what inquiries a manager ought to make when opening the account of a married woman. The evidence indicates to me that he would generally inquire or somehow learn about her means and circumstances, and, if she was living with her husband, something about him and his occupation or position in life. At no stage of this account was anything known or ascertained about Mrs. Smith or her husband, either at Redhill or Weybridge. It does not appear that any one in the different branches even noticed all through the long course of the account how peculiar the account was, or troubled at all in the matter, in some degree no doubt because of the dual system of crediting. Proper inquiries at Redhill might or might not have led to the fraud being nipped in the bud. But in any case no such inquiries were made, and here also by a somewhat different route I reach the same conclusion as in regard to the Perkins cheques—namely, that the defence under s. 82 is not made out.

I think the appeal fails on all points.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 8, 1932.

Solicitors for appellants: *Gregory, Rowcliffe & Co.*
Solicitor for respondents: *William Charles Crocker.*

[HOUSE OF LORDS.]

H. L. (E.)*
1932
Dec. 8.

PROVINCIAL INSURANCE COMPANY, LIMITED . . . . APPELLANTS;

AND

MORGAN AND ANOTHER . . . . . . RESPONDENTS.

Insurance—Accident—Motor Lorry—Proposal Form—Statement made Basis of Contract—Condition precedent—Truth of Statement—Construction of Proposal Form.

Coal merchants, owners of a motor lorry, applied to an insurance company for a form of proposal for an insurance against damage to the lorry and against liability for injury to persons and damage to other vehicles caused by the use of the lorry. The proposal form which they received contained questions to be answered by the proposers as to the purposes for which the lorry was to be used and the nature of the goods to be carried. The proposers having answered in writing that the purpose was the delivery of coal, and that the substance to be carried was coal, signed the proposal form, and thereby warranted and declared that the questions were fully and truthfully answered, and that the declaration and the answers should be the basis of the contract. The company then issued a policy which, after reciting—that the assured had made the proposal and signed a declaration which it was agreed should be deemed to be of a promissory nature and effect, and should be the basis of the contract as if it had been incorporated in the policy, went on to witness that it was a condition precedent to any liability on the part of the company (1.) that the terms, conditions and indorsements thereof should be duly and faithfully observed; and (2.) that the statements made and the answers given in the proposal form should be true, correct and complete. Under the heading "Endorsements and Use Clauses" were the words "Transportation of own goods in connection with the insured business." The premium paid by the assured was less than that which would have been payable if they had stated that the lorry was to be used for the purposes of general haulage.

On a day during the period covered by the policy the assured were using the lorry for carrying a load of timber under a contract together with 5 cwt. of coal. After they had delivered all the timber and 3 cwt. of the coal, and while they were on their way to deliver the remaining 2 cwt. of coal to a customer, a collision occurred between the lorry and a motor car whereby the lorry was injured and the owner of the car sustained damage.

In an arbitration under the policy the assured claimed a declaration that they were entitled to be indemnified against claims for the damage done by and against loss from damage done to their lorry. The insurance company denied liability on the grounds that the assured had failed to observe the conditions that the lorry should be used only (1.) for the carriage of coal; (2.) for the carriage of the assured's own goods in connection with their business of coal merchants.

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

The arbitrator having made an award in the form of a special case in favour of the assured, and his decision having been affirmed by Rowlatt J., an appeal to the Court of Appeal was dismissed on the ground that the questions in the proposal form and the answers thereto were to be regarded as descriptive of the risk, so that the assured were covered by the insurance while the lorry was being used for carrying coal but uncovered while being used for other purposes.

On appeal from that decision:—

Held (without differing from the ratio decidendi of the Court of Appeal), upon the construction of the proposal form, that it was not the intention of either party to exact or to give a warranty that the lorry should never be used for any purpose other than the carriage of coal; that the questions and answers were intended to ascertain the intentions of the assured with regard to the user of the lorry and the goods to be carried therein, and that the answers were true, correct and complete, and that there was no breach of warranty or of any condition precedent to liability.

Order of the Court of Appeal [1932] 2 K. B. 70 affirmed on these grounds.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. upon an award in the form of a special case stated by an arbitrator under s. 7 of the Arbitration Act, 1889.

The respondents, Messrs. Morgan & Foxon, were coal merchants carrying on business at Abercarn in the county of Monmouth. They had effected a policy of insurance with the appellants in respect of a 15.9 horse-power Morris motor lorry. The policy was dated April 8, 1930, and was made in compliance with a proposal in writing dated March 26, 1930, whereby the respondents declared and warranted that the questions asked therein were fully and truthfully answered, and agreed that this declaration and the answers should be the basis of the contract between themselves and the appellants. Among other inquiries and answers made by the appellants and given by the respondents were these:—
"State (*a*) the purposes in full for which the vehicle will be

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(1) [1932] 2 K. B. 70.

used; and (*b*) the nature of the goods to be carried." The answers were: "(*a*) Delivery of coal; (*b*) Coal."

The appellants accepted the proposal, and on April 8, 1930, issued a policy of insurance to the respondents in respect of the motor lorry. The policy was to remain in force until April 4, 1931. It recited that the respondents had made the proposal and signed a declaration which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract of insurance intended to be made in all respects as if it had been incorporated in the policy. By its terms the appellants agreed for the consideration stated, but subject to the terms, exclusions and conditions set out and indorsed thereon, to indemnify the respondents against the following among other risks:—

"(1.) Liability to the public—(*a*) Liability at law for compensation (including the law costs of any claimant) for death or bodily injury to persons not in the service of the insured caused by the use of any vehicle described in the schedule hereto: (*b*) Liability at law for damage (including law costs of any claimant) to property . . . . other than property of the insured . . . .

"(2.) Loss or damage—The loss of or damage to the vehicle and necessary lamps, tyres, and accessories whilst thereon caused by (*a*) accidental external means" . . . . It contained a condition that any difference or dispute arising between the parties regarding any claim arising thereunder should be referred to arbitration under the Arbitration Act, 1889, and that the obtaining of an award in such arbitration should be a condition precedent to any liability on the part of the appellants.

It also contained the following condition: "(6.) It is a condition precedent to any liability on the part of the Company" (the appellants) "under this policy (i) that the terms, provisions, conditions, and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and answers given in the proposal hereinbefore referred to are true, correct, and

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complete." Under the heading, "Endorsements and Use Clauses" on the back of the policy were the words: "Transportation of own goods in connection with the insured business." The premium paid by the respondents was less than that which would have been payable if they had stated that the lorry was to be used for the purposes of general haulage.

At a date subsequent to the issue of the policy the appellants entered into a contract with the Forestry Commissioners for the hauling of timber at such times as might be arranged between the parties thereto. This contract did not prevent the appellants from using the lorry for delivering coal.

On August 25, 1930, the lorry had been used until noon solely for delivering coal, but the respondents had arranged with the Forestry Commissioners to haul two loads of timber in the afternoon of that day. At 3.45 P.M. the appellants hauled a load of timber. At 6.30 they hauled a second load of timber, but had also on the lorry 5 cwt. of coal which they intended to deliver to customers when they had completed the journey with the second load of timber. At the request of a representative of the Forestry Commissioners the appellants hauled a third load of timber, and the 5 cwt. of coal remained on the lorry until this was done. After delivering the third load of timber, the appellants proceeded to deliver the coal. They delivered 1 cwt. of coal to one customer, and 2 cwt. to another. On their way to deliver the remaining 2 cwt. to a customer a collision occurred between the motor lorry and a motor car belonging to one Charles John Thomas whereby damage was done to the lorry and to the car and C. J. Thomas and one Rose Winter were injured.

On these facts the arbitrator awarded that the appellants were liable to indemnify the respondents against the damage done to the lorry and to the motor car and to the persons injured therein.

On the hearing of the special case Rowlatt J. upheld the award of the arbitrator. On an appeal to the Court of Appeal

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that Court (Scrutton, Lawrence and Slesser L.JJ.) affirmed the decision of Rowlatt J. (1) Hence this appeal.

Nov. 14. *Croom-Johnson K.C.* and *Wallington* for the appellants. This case falls exactly within the words of Lord Haldane in *Dawsons, Ld.* v. *Bonnin* (2): "If the" (insurers) "can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the" (assured) "being able to recover." The question in that case was: "State full address at which the vehicle"—a motor lorry—"will usually be garaged." The address given was that of the assured's place of business in Glasgow. In fact the lorry was usually garaged at a farm outside Glasgow and was destroyed by fire while there. Among the questions in the present case was: "State the purposes in full for which the vehicle will be used"; and the answer was, "Delivery of coal." In fact it was also used for the haulage of timber. There is another statement, that it shall be used for "Transportation of" the respondents' "own goods in connection with the insured's own business within stated"—namely, that of a coal merchant. In fact it was used for carrying goods other than coal. It is hard to imagine stronger or more apt words to express the intention that the appellants contracted to get an accurate answer to the questions they asked: the respondents warrant and declare that the questions are fully and truthfully answered and that the declaration and answers shall be the basis of the contract; and the policy provides that it is a condition precedent to any liability of the appellants that the conditions to be complied with by the respondent are duly and faithfully observed and that the statements made and answers given shall be true, correct, and complete. In such circumstances, as Lord Haldane says, the validity of the policy is conditional on the answers being correct, whether the answers are material or not; but in this case they were material; it has been found by the arbitrator that a higher

(1) [1932] 2 K. B. 70.

(2) [1922] 2 A. C. 413, 421.

premium would be payable if the lorry was to be used for general haulage. The opinion of Lord Cave in the same case (1) strongly supports the appellants.

W. Matabele Davies for the respondent was not called on.

The House took time for consideration.

Dec. 8. Lord Buckmaster. My Lords, the question on this appeal depends upon the true construction of a policy of insurance issued by the appellants in favour of the respondents insuring them against liability to the public for damage caused by the use of a motor vehicle. The insurance was consequent upon a proposal form which was signed by the respondents in March of 1931. In that form there was a statement in the following words: "State (*a*) the purposes in full for which the vehicle will be used; and (*b*) the nature of the goods to be carried." The answer was (*a*) "delivery of coal"; (*b*) "coal." At the foot of the proposal form and above the respondents' signature was a statement in the following words:—

"I hereby declare and warrant that the above questions are fully and truthfully answered, that I have not withheld or concealed any circumstance affecting in any way the proposed insurance, and that the vehicles described are in good condition. I agree that this declaration and the answers above given shall be the basis of the contract between me and the Provincial Insurance Co., Ltd., and I agree to accept a policy subject to the conditions prescribed by the Company and expressed in the policy."

The policy which was subsequently issued referred to the proposal and declaration which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract for the insurance thereby intended. The policy itself provided that the indemnity should be subject to the exclusions and conditions therein set out, and one of those conditions was condition 6:—

"It is a condition precedent to any liability on the part of the Company under this policy: (i) that the terms,

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(1) [1922] 2 A. C. 432 et seq.

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provisions, conditions and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal hereinbefore referred to are true, correct and complete."

And one of the indorsements was under the head "Endorsements and Use Clauses," "Transportation of own goods in connection with the insured business."

The respondents in fact did use their cart for hauling timber of the Forestry Commission in pursuance of a verbal contract to that effect and had so used it on the day when an accident occurred. But the finding of fact is clear that the claimants were engaged in the business of delivering coal when the accident arose, and it is not suggested that this was not in general terms the use to which the vehicle was put. The appellants have repudiated liability under the contract upon the ground that the use of the lorry for a purpose other than that of carrying coal was a breach of the statement as to the purpose for which the vehicle was to be used, and as this was made the basis of the contract the risk has never attached. Now it is old and well known law that parties to an insurance contract are at liberty to contract upon the footing that any statement can be made the basis of the contract, and if the statement be inaccurate its materiality does not arise. In the case of *Dawsons, Ld.* v. *Bonnin* (1) Lord Haldane said: "If the respondents can show that they contracted to get an accurate answer to this question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the appellants being able to recover." He then continues in words which I think must have been overlooked in some of the other cases, for he says that the question which lies at the root of the matter is simply one of construction. From that it follows that unless some other contract of insurance is either couched in identical terms or terms the effect of

(1) [1922] 2 A. C. 413, 421.

which cannot be distinguished from those which were there considered, this authority, except so far as it shows that a contract as to future conduct can equally be made the basis of a contract with a statement of existing fact, does no more than apply well established principles to a special state of facts. It is for that reason that I cannot see that either the antecedent case of *Farr* v. *Motor Traders Mutual Insurance Society* (1), or the subsequent case of *Roberts* v. *Anglo-Saxon Insurance Association* (2), are affected by the decision. In each of these cases it was held that a description as to the use to which a vehicle was to be put was descriptive of the character of the risk rather than a warranty that that particular use and no other was the one to which the vehicle was confined, and this depended upon the meaning of the words in a particular document.

I entirely agree with Scrutton L.J., when he says that neither in this case nor in the other cases has the question arisen in such a manner that it can be said that this House has decided it. Turning, therefore, back to the words in the present case, the question that arises is, were these words intended to mean that the use of the vehicle was to be exclusively confined to that of carrying coal, so that any temporary, trivial, and incidental use would completely defeat the policy, or was it not? I wish again to repeat that it is perfectly open to people to make such a bargain, and when made it is useless to complain that the bargain is harsh. But it is at least essential that the bargain should be plain in order that it may be clear that a man has contracted on the faith of something which may rob the insurance of the greater part of its value. It is said here that the insurance was at a lower rate because it was a coal cart; and that may be so, but that does not help the question on the one side or the other. To state in full the purposes for which the vehicle is to be used is not the same thing as to state in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle it is not suggested that the answer was inaccurate.

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(1) [1920] 3 K. B. 669.

(2) (1927) 96 L. J. (K. B.) 590.

I am therefore of opinion that there was no bargain here so to confine the use of the vehicle to the cartage of coals as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the policy was based.

I think the judgment of the Court of Appeal was right, and the full explanation given by Scrutton L.J. renders further elaboration unnecessary.

LORD BLANESBURGH. My Lords, I am of the same opinion.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the opportunity of reading the opinion delivered by my noble and learned friend on the Woolsack, and also that about to be delivered by Lord Wright. I entirely concur with those opinions, and have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, it appears to me that the result of this appeal depends solely upon the true construction of the documents.

There is no need for me to recapitulate the facts. It is sufficient to say that the insurance company claim that the policy by its terms provides that if at any time during its currency the assured used the vehicle in question for any purpose other than the delivery of coal, or carried in it goods other than coal, no liability on the part of the insurance company would arise thereunder.

The foundation of this contention is as follows: The proposal form requires the proposer (amongst other things) to state (*a*) the purposes (in full) for which the vehicle will be used, and (*b*) the nature of the goods to be carried. The proposers stated: (*a*) Delivery of coal; (*b*) coal: and they signed a declaration that the questions were fully and truthfully answered. The policy refers to the proposal and declaration which (it provides) shall be deemed to be of a promissory nature and effect and shall be the basis of the contract as if incorporated in the policy. One of the conditions indorsed on the policy runs thus:—

"(6.) It is a condition precedent to any liability on the part of the Company under this policy: (i) that the terms, provisions, conditions and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal hereinbefore referred to are true, correct and complete."

It is contended by the appellants that the statement above referred to constituted a statement: (*a*) that during the currency of the policy the vehicle would never be used for any purpose other than the delivery of coal; and (*b*) that during the currency of the policy coals, and coals only, would be carried in the vehicle. They then say that these statements are incorporated into the policy as contractual provisions relating to something to be done or complied with by the insured, the due and faithful observance of which is under condition 6 a condition precedent to any liability on the part of the insurance company; and that the vehicle having in fact been used during the currency of the policy for the purpose of carrying timber, no liability can attach to the insurance company. Alternatively it was said that the answer given in the statement was not true, correct, or complete because the vehicle had in fact subsequently carried timber, with the result of freeing the insurance company from liability under the second part of condition 6.

This argument in my opinion breaks down at the outset. I cannot read the above statements in the proposal form as being more than statements by the proposers of their intentions as to the user of the vehicle and the goods to be carried in it, and so as descriptive of the risk. If it had really been the intention of the insurance company that the carrying of goods other than coal at any time should free them from liability in respect of an accident happening subsequently, it was incumbent on them to make that abundantly clear to the proposers. On the construction which I give to the statement there is no scope for the operation of condition 6 in favour of the insurance company. It is not shown that there has been any failure of the insured to observe any provision relating to anything to be done or complied with by them, or that their answers were not true, correct, and complete.

A further point was raised—namely, that condition 6 freed the insurance company from liability by reason of the presence in the policy immediately after the schedule of the following words: "Endorsements and Use Clauses. Transportation of own goods in connection with insured's own business within stated." It was said that this was an indorsement by which the insured contracted that only their "own goods" in connection with their coal business should be carried in the vehicle, and that the carriage of the timber was (within condition 6) a failure duly and faithfully to observe that indorsement, meaning no doubt a failure to comply with some obligation imposed by the indorsement.

I have read the policy with this in view, but I have been unable to discover how or where any obligation is imposed on the insured by this indorsement. It may be that we have here some form of commercial shorthand, which an expert could transcribe into a contractual obligation. I am unequal to the task.

For myself I think it is a matter of great regret that the printed forms which insurance companies prepare and offer for acceptance and signature by the insuring public should not state in clear and unambiguous terms the events upon the happening of which the insuring company will escape liability under the policy. The present case is a conspicuous example of an attempt to escape liability by placing upon words a meaning which, if intended by the insurance company, should have been put before the proposers in words admitting of no possible doubt.

In the view which I take of this case it is unnecessary to refer to any of the authorities which were cited. I would dismiss this appeal with costs.

LORD WRIGHT. My Lords, this appeal raises a question as to the true construction of a policy dated April 8, 1931, issued by the appellants insuring the respondents as owners of a commercial motor vehicle against loss of or damage to the vehicle and also against third party risks for the period from April 4, 1930, to April 4, 1931. On August 25, 1930, a collision occurred between the respondents' vehicle and a motor car belonging to third parties, in which both vehicles were damaged and certain persons sustained injuries. The appellants contested their liability and the dispute was referred to arbitration. The arbitrator found that the respondents, who were coal merchants and who used the vehicle for the delivering of their coal, had, at a date subsequent to the issue of the policy, made occasional use of it to haul timber under a verbal contract between them and the Forestry Commissioners, but not so as to prevent them from using the vehicle for the delivery of coal. On the day of the accident the respondents were at the time of the accident actually engaged in the delivery of coal, though earlier that afternoon they had been hauling timber for the Forestry Commissioners; they had however ceased doing so before the accident. The appellants contended that before the accident the policy had been avoided by reason of the haulage of timber mentioned above. The arbitrator decided against that contention; his award in the form of a special case was upheld by Rowlatt J., whose judgment was unanimously affirmed by the Court of Appeal; from their decision this appeal comes before your Lordships.

The question turns entirely on the construction of the contract. The narrow issue is whether there was a warranty or condition of the policy that the vehicle should exclusively be used for delivery of coal by the respondents and, as a minor issue, for delivery of the respondents' own coal in connection with their business as coal merchants. The policy is in a form which has in its general scheme long been in use by insurance companies, though the general scheme has exhibited many variations, some major and some minor, in detail. In that scheme there is a proposal form, signed by the assured, containing various particulars and answers to various questions, and a declaration that the answers are to be the basis of the contract and an agreement to accept the company's policy. The policy itself contains a recital incorporating the proposal and declaration and it sets out the risk insured, certain exceptions and conditions and a schedule embodying various particulars. Though this general scheme of policy has been, as it were, sanctified by long usage, it has often been pointed out by judges that it must be very puzzling to the assured, who may find it difficult to fit the disjointed parts together in such a way as to get a true and complete conspectus of what their rights and duties are and what acts on their part may involve a forfeiture of the insurance. An assured may easily find himself deprived of the benefits of the policy because he has done something quite innocently but in breach of a condition, ascertainable only by the dovetailing of scattered portions. In the present policy the conditions which the appellants claim as limiting the user of the vehicle under the policy to the delivery of the respondents' own coal in the course of their business are to be ascertained from the following matters :—

(1.) An answer in the proposal to the following question : "(1.) state (*a*) the purposes (in full) for which the vehicle will be used, and (*b*) the nature of the goods to be carried." The answers were "(*a*) delivery of coal ; (*b*) coal."

(2.) The declaration signed by the respondents in the following terms : "I hereby declare and warrant that the above questions are fully and truthfully answered. . . . . I agree that this declaration and the answers given above shall be the basis of the contract between me and the company, and I agree to accept a policy, subject to the conditions prescribed by the company and expressed in the policy."

(3.) The recital in the policy incorporating the proposal and declaration "which it is agreed shall be of a promissory nature and effect and shall be the basis of the contract."

(4.) Condition 6, which is in the following terms : "It is a condition precedent to any liability on the part of the company under this policy (i.) that the terms, conditions and indorsements hereof so far as they relate to anything to be done or complied with by the insured are duly and faithfully observed ; and (ii.) that the statements made and answers given in the proposal hereinbefore referred to are true, correct and complete."

(5.) The description of the insured's business in the schedule as coal merchants, read with the terms of the recital describing them as carrying on the business therein defined and no other, for the purpose of this insurance.

(6.) The words under a heading "Indorsements and Use Clauses," "Transportation of own goods in connection with the insured's business within stated."

Before examining these provisions in detail, certain principles laid down in the authorities may be referred to. It was decided by this House in *Dawsons, Ld.* v. *Bonnin* (1) that words in a policy analogous to those in the present policy, stating that "the proposal shall be the basis of the contract and be held as incorporated therein," are words apt to convert answers to questions into conditions of the policy. The answer there in question was to the question "state full address at which the vehicle will usually be garaged." By a pure inadvertence a wrong address was given. Neither at the inception of the policy period, nor at any subsequent date, nor at the time of the loss had the vehicle been garaged at that address. It was held by this House that the assured could not recover because the assured had broken the condition in the policy as to the usual place where the car was garaged. It was held that the incorporation of the answer into the contract as its basis constituted it a condition: it was not relevant to consider whether the matter of question and answer was or was not material. That decision involved an extension of the earlier judgment of this House, in *Thomson* v. *Weems* (2), where the policy expressly provided that "if anything averred in the declaration . . . . shall be untrue, this policy shall be void, and all moneys received by the said company in respect thereof shall belong to the said company for their own benefit." The later case (1) held that the same effect resulted from the word "basis." On the other hand it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of sale of goods), though it must be strictly complied with, must be strictly though reasonably construed. In the present case the appellants do not allege that there was any concealment or misrepresentation nor do they complain of any of the other answers. The relevant answer, which I have quoted above, does, I think, refer to the future and is, in my opinion, of a promissory nature and is apt to create a warranty or condition.

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(1) [1922] 2 A. C. 413.

(2) (1884) 9 App. Cas. 671.

That leaves the essential problem as to what is the exact scope of this condition. The breach of condition alleged is not that the normal use of the vehicle was other than delivery of coal in the course of the respondents' business, but its occasional use for hauling the timber as found by the arbitrator. There can therefore be no breach involved unless the relevant warranty or condition imports that the vehicle is to be used for delivery of coal and no other purpose, that is, that the vehicle during the currency of the policy is to be exclusively so used. In my judgment, on a fair construction of the material question and answer this is not the true construction; accordingly in my judgment the appellants fail in their contention that a condition was broken so that the policy was not in force at the time of the accident. The position is not affected, as I think, by condition 6. The relevant answer is, according to my construction, true, correct and complete: the vehicle was in fact used for the carriage of the respondents' coal, whether the matter is regarded as at the date of the contract, at the date of the accident, or at the intervening dates: it is not suggested that the respondents did not intend so to use it: hence the answer was true and correct, and complete because it gave all the information asked for: there was no question as to exclusive use: the words "in full" in the question, which the appellants rely on, are not sufficiently clear to carry the meaning of exclusive user. The appellants further say that within condition 6 (1.) there was a failure by the assured duly and faithfully to observe "the indorsements," which is said to be "Transportation of own goods." I should read these words as coming not under "Endorsements" but under "Use Clauses." But on any view the appellants' case breaks down there exactly for the same reason as on the material answer. In my judgment this case is to be distinguished from *Dawsons, Ld.* v. *Bonnin* (1) on the ground that in that case the condition was expressed in clear and unambiguous terms and was clearly broken, whereas the contrary is the fact here. The old authority of *Shaw* v. *Robberds* (2) affords some parallel to the present: in that case there was a fire policy insuring "a kiln for drying corn in use": the kiln was used for drying corn, till one day during the policy period it was used, no doubt as a friendly act and not in the course of business, to dry bark from a vessel which had sunk near the kiln: in the process a fire occurred and the premises were burnt down: though the jury found that drying bark was a different business, more dangerous, and involving a higher premium of insurance than drying corn, the plaintiff succeeded. Lord Denman C.J. said (3): "No clause in this policy amounts to an express warranty that nothing but corn should ever be dried in the kiln; and there are no facts, or rule of legal construction, from which an implied warranty can be raised." These words seem to me mutatis mutandis to apply to the present case.

The appellants could certainly, if they wished, have taken the right to treat the policy as avoided for any breach of warranty or condition, however trivial or immaterial, but to do so they must have used clear words. As Lord St. Leonards said in *Anderson* v. *Fitzgerald* (4): "A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it." If this policy were construed as involving that the respondents could not enforce it because of what they did in hauling timber, I think they would be "caught." It would have

(1) [1922] 2 A. C. 413.
(2) (1837) 6 A. & E. 75.
(3) 6 A. & E. 83.
(4) (1853) 4 H. L. C. 484, 510.

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been easy for the appellants to set out in plain terms on their policy that it was a condition of the insurance that the user of the vehicle should be restricted to delivery of coal in the assured's business of coal merchants: they have not done so.

This conclusion is sufficient to dispose of the appeal. But I must not be taken to dissent from the opinion of Scrutton L.J. that the relevant question and answer are to be construed as defining or describing the risk covered by the policy.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Dec. 8, 1932.

Solicitor for appellants: *J. Murray Napier, for C. James Hardwicke & Co., Cardiff.*

Solicitors for respondents: *Collyer-Bristow & Co., for D. Granville West, Newbridge.*

[HOUSE OF LORDS.]

ADAMSON AND ANOTHER . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . RESPONDENT.

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Revenue—Estate Duty—Settlement—Trusts for surviving Children—Power of Appointment among Children—Contingent Interests—Death of Settlor—Vested Interests—Passing of Property—"Interest provided by the Deceased"—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*d*).

By s. 1 of the Finance Act, 1894: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned . . . ."

By s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . . (*d*) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

By a settlement dated March 24, 1924, trustees were directed to apply the capital of the trust fund for the benefit of the settlor's children then living or thereafter to be born as he in writing should appoint; during his life the income of the whole or so much of the capital as had not been so appointed was to be applied by the trustees for the benefit of all or any of the children of the settlor as he the settlor might direct and subject thereto to be held as an accumulation to capital.

After the death of the settlor the capital and income of the funds not already distributed were to be held in trust for all or any of the settlor's children living at his death as he should by deed or will appoint, and in default of appointment in trust as to two-fifths for his son and as to the remaining three-fifths for equal division among all the other children of the settlor living at his death. If the son died before attaining a vested interest in the said two-fifths there was a gift over of that share to the children entitled to the remaining three-fifths. If there were no child of the settlor who attained a vested interest then there was a gift over in trust for the person or persons who under the Statutes of Distribution of the effects of intestates would have become entitled thereto at the decease of the settlor if he had died possessed thereof intestate.

The settlor died on March 11, 1928, without having made any appointment by deed or will of the funds undistributed at the date of the settlement, and leaving him surviving a son and three daughters, all of whom were born before the date of the settlement:—

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

Held (by Lord Warrington of Clyffe, Lord Russell of Killowen, and Lord Wright), that the property did not pass on the death of the settlor within the meaning of s. 1 of the Act; Lord Buckmaster and Lord Blanesburgh being of opinion that it did so pass.

Held (by Lord Buckmaster, Lord Blanesburgh, Lord Warrington of Clyffe, and Lord Wright; Lord Russell of Killowen dissenting), that the beneficial interest of each child of the settlor in the settled funds and accumulations, to the extent to which the principal value of such beneficial interest upon the death of the settlor exceeded the actual value if any of the expectant beneficial interest of each child before the settlor's death, was an interest accruing or arising on the death of the settlor and was to be deemed to be property passing on the death of the settlor within the meaning of s. 2, sub-s. 1 (*d*), of the Act, and that Estate Duty on the principal value of the excess was leviable.

Declaration accordingly.

Order of the Court of Appeal [1932] 2 K. B. 159 varied.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Rowlatt J. on an information by the Attorney-General on behalf of His Majesty under s. 1, or alternatively under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894. (2)

The question raised by the appeal was whether Estate Duty became payable on the death on March 11, 1928, of John Weston Adamson the elder (hereinafter referred to as "the settlor"), under the above sections or either of them, in respect of (*a*) the whole or any part of certain trust funds which had been settled by the settlor in his lifetime in favour of his children, and (*b*) the accumulations of the income of those trust funds during the life of the settlor.

The indenture declaring the trusts of the settlement was dated March 24, 1924, and was made between the settlor of the one part and the appellants (therein referred to as "the new trustees") of the other part. The trust had in fact been created by the settlor some years previously, but no deed declaring the trusts had been executed before March 24, 1924. The indenture of that date is hereafter referred to as the settlement of 1924. It contained the following clauses:—

"1. The settlor in exercise of the power for this purpose vested in him under the Trustee Act, 1893, hereby appoints the new trustees to be trustees for the purposes of the trusts aforesaid which the settlor doth hereby declare to be as follows :—

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(1) [1932] 2 K. B. 159.

(2) See headnote.

" 2. The new trustees may either allow such of the settled funds as are invested to remain as actually invested as long as the new trustees in their absolute and uncontrolled discretion think fit or may at any time or times at the like discretion sell call in or convert into money the same or any part thereof respectively and shall at the like discretion invest the moneys produced thereby and all capital moneys which may be received upon the payment or discharge at maturity of all or any debentures or securities forming part of the settled funds at any time and from time to time and any other capital moneys which may be received by the new trustees in respect of the settled funds including the cash mentioned in the schedule and any income not applied for the benefit of the settlor's children or any of them under any direction by the settlor pursuant to clause 4 hereof in the names or under the control of the new trustees in or upon any investments referred to in clause 6 hereof with power at such discretion as aforesaid to vary or transpose such investments.

" 3. The new trustees shall pay and apply the capital of the settled funds unto all or any of the children or child of the settlor now living or hereafter to be born, in such shares and proportions and in such manner and at such time or times as the settlor may from time to time direct in writing and in default of such direction and so far as any such direction shall not extend the capital of the settled funds not so paid and applied shall be held by the trustees upon the trusts following.

" 4. If and so long as there shall be in the hands of the new trustees any of the capital of the settled funds which shall not have been paid and applied in accordance with the directions of the settlor pursuant to clause 3 hereof the income of such settled funds shall be paid or applied by the new trustees unto or for the maintenance and support or otherwise for the benefit of all or any of the children or child for the time being of the settlor in such shares and proportions and in such manner and at such time or times as the settlor may from time to time direct in writing and in default of such direction and so far as any such direction shall not extend the income not so paid shall be held by the trustees upon the same trusts as are applicable and as an accretion to the capital of the settled funds.

"5. (*a*) After the death of the settlor the new trustees shall stand possessed of the capital and income of the settled funds which shall not have been paid and applied in accordance with the directions hereinbefore mentioned In trust for all or any one or more of the children of the settlor living at the death of the settlor at such age or time ages or times in such shares if more than one and in such manner as the settlor shall by deed or will or codicil appoint and in default of any such appointment and so far as any such appointment shall not extend in trust as to two-fifths thereof for the said John Weston Adamson the younger the son of the settlor and as to the remaining three-fifths for equal division among all the other children of the settlor living at his death share and share alike as tenants in common and not as joint tenants.

"(*b*) But so that no child who shall take any share under any such appointment as aforesaid or under any direction given pursuant to clause 3 hereof as to capital of the settled funds shall take any share in the unappointed part (if any) of the capital of the settled funds without bringing the share or shares already appointed or directed (including the amounts applied or appropriated to the son and two daughters of the settlor as hereinbefore recited) or hereafter appointed or directed to be paid to him or her into hotchpot and accounting for the same accordingly unless the settlor shall in the instrument making such appointment or at the time of making such direction so stipulate and determine by writing under his hand.

"(*c*) Provided always that if the said son of the settlor shall die before he attains a vested interest in the settled funds under the foregoing trusts the two-fifths share directed to be held in trust for him shall be added to the shares of the other children of the settlor living at the death of the settlor

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and held upon the like trusts as are hereinbefore declared with respect to the shares of such other children.

"(*d*) And if there shall be no child of the settlor who attains a vested interest in the settled funds under the foregoing trusts then in trust for the person or persons who under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the settlor if he had died possessed thereof intestate and domiciled in England such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes."

At the date of the settlement of 1924 the settlor had four children—namely, John Weston Adamson the younger, Mary Frances Cail, the wife of Harry Ingledew Cail, Clarice Muriel Weston Goodson, the wife of Alan Richard Goodson, and Audrey Weston Adamson. Of these the first three were of age at the date of the settlement. Audrey Weston Adamson attained the age of twenty-one on March 16, 1929.

At the date of the settlement of 1924 the settlor had applied part of the settled funds for the benefit of the three elder children—namely, 9473*l.* 2*s.* to John Weston Adamson the younger, 10,000*l.* to Mrs. Cail, and 10,000*l.* to Mrs. Goodson.

Under the power conferred upon the settlor by clause 3 of the settlement, above set out, the sum of 518*l.* 11*s.* 1*d.* was in and about December, 1925, raised out of the capital of the settled funds and paid to John Weston Adamson the younger; and under the powers conferred by clause 4 sums amounting to 825*l.* and 736*l.* 1*s.* 3*d.* were paid out of income to John Weston Adamson and Audrey Weston Adamson respectively. The whole of the remainder of the income arising from the settled funds during the life of the settlor was accumulated as an accretion to the capital of the settled funds. The value of the funds including the accumulations of income was at the death of the settlor approximately 128,437*l.*

The settlor died on March 11, 1928, without having exercised, except as above stated, the powers conferred on him by clauses 3 and 4 of the settlement, and leaving his four children and no more him surviving.

The Commissioners of Inland Revenue claimed that the settled funds and accumulations were property which passed on the settlor's death within the meaning of s. 1 of the Finance Act, 1894; or, alternatively, that the interests of the children of the settlor in the settled funds and accumulations were interests provided by the settlor within the meaning of s. 2, sub-s. 1 (*d*), of the Act, which arose on his death, and that in either case Estate Duty at the approximate rate became payable in respect of the whole of the settled funds and accumulations.

On June 12 and 15, 1931, the information was heard before Rowlatt J., who gave judgment for the Crown, holding that Estate Duty was payable under either s. 1, or s. 2, sub-s. 1 (*d*), of the Finance Act, 1894.

The trustees appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Greer and Romer L.JJ.) affirmed the judgment of Rowlatt J. and dismissed the appeal. (1)

The trustees now appealed to this House.

Nov. 7. *Wilfrid Greene K.C.*, *W. P. Spens K.C.*, and *P. M. Walters* for the appellants. The Court of Appeal was wrong in holding that any property passed by virtue of this settlement upon the death of the settlor within the meaning of s. 1 of the Finance Act, 1894. The settlement provided that the capital of the fund should be applied to all the children of the settlor then living or thereafter to be born in such proportions as he might direct. The income was also to be applied for the benefit of the children for the time being of the settlor as he might direct, and so far as any such direction should not extend it was to he held by the trustees as an accretion to capital. After the settlor's death the trustees were to stand possessed of the capital and income which had not been applied under the directions above mentioned, " in trust for all or any one or more of the children of the settlor living at the death of the settlor at such . . . . ages . . . . in such shares . . . . and in such manner as the

(1) [1932] 2 K. B. 159.

settlor" should "by deed or will or codicil appoint"; and in default of such appointment two-fifths of the funds and accumulations were to be for the son and the remaining three-fifths "for equal division among all the other children of the settlor living at his death, share and share alike." Thus the son took a vested interest liable to be divested: (1.) by the exercise of the settlor's power of appointment; (2.) by death before attaining a vested interest. The interest of each of the daughters was contingent and might be defeated: (1.) by the exercise of the settlor's power of appointment; (2.) by the birth of children after the date of the settlement, and (3.) by failure to survive the settlor.

In these circumstances it is an undue stretch of language to say that any property passed on the death of the settlor. After the execution of the settlement no interest in the settled property remained in the settlor. All interest therein passed from him in his lifetime and could not therefore pass on his death. No doubt on his death a change took place in the interests which had already passed. The daughters' interests became fixed in amount and vested from having been merely contingent, and the son's interest was freed from liability to be divested; but in no case did any interest pass, for all that remained in the settlor was a power of appointment, and a power is not property. No property "changed hands," to use Lord Macnaghten's phrase in *Earl Cowley* v. *Inland Revenue Commissioners* (1); there was no "passing in point of fact on death according to the natural meaning of the words," to quote Lord Haldane in *Attorney-General* v. *Milne* (2), and no "actual change in the title or possession of the property as a whole which" took "place at the death," to adapt Lord Parker's words in the last named case. (3) Therefore the case does not fall within s. 1 of the Act.

Neither does it fall within s. 2, sub-s. 1 (*d*). That sub-section deals with "any annuity or other interest purchased or provided by the deceased"; that is to say, with interests

(1) [1899] A. C. 198, 210, 211. (2) [1914] A. C. 765, 770.
(3) [1914] A. C. 779.

which resemble policies of life insurance and which, only coming into existence on a death, cannot be said to pass on the death. These are to be deemed to be included in the property described in s. 1: see *Attorney-General for Ireland* v. *Robbinson* (1), per Palles C.B. But they are only to be deemed to be so included to the extent of any beneficial interest "arising or accruing on the death of the deceased"; and the same contention which would exclude this property from the operation of s. 1 would exclude it from s. 2, sub-s. 1 (*d*); the beneficial interests of the children arose and accrued before and not upon the death of the settlor.

Sir F. Boyd Merriman S.-G. and *J. H. Stamp* for the respondent. The settlor saw to it that nothing should pass in possession before his death. "Passing on the death" means passing in possession. Moreover, it does not mean passing from the donor, which may have occurred in this case before the death of the settlor: it means passing to the donee, which occurred on his death. Great skill in conveyancing has been exerted in order to reconcile two inconsistent objects—namely, to divest the settlor of his property in his lifetime and yet keep him in control of it until the day of his death; but the only result has been to prolong the process by which the property passed. The process began in March, 1924, or even before that date; but it cannot be said to have been completed until the donees were put in possession and enjoyment of the property; and that happened on the death of the settlor, and not before. The property then passed on the death of the settlor and the case falls within s. 1 of the Act.

But if that is not the true view, then it is submitted that the share of each of the children was "an interest provided by the deceased" whereby a "beneficial interest" has accrued or arisen on the death of the deceased; and that the difference in value between the beneficial interests of the children before the death of the settlor and their interests after his death is to be deemed to be property passing on the death of the settlor by virtue of s. 2, sub-s. 1 (*d*).

(1) [1901] 2 I. R. 67, 89, 90.

Greene K.C. in reply. The passing of property is not in its nature a process capable of prolongation. It must begin and end with the death; otherwise neither s. 1 nor s. 2 of the Act applies.

The House took time for consideration.

Dec. 8. LORD BUCKMASTER. My Lords, the provisions of cl. 1 of the Finance Act of 1894 are so well known that their verbal repetition is unnecessary. They provide that there shall be levied a duty, called Estate Duty, on all property "which passes on the death" of every person dying after the commencement of the Act. The overriding and dominating word of this section is the word "passes." It makes no difference from whom the property passes, nor to whom; in order to satisfy the claims, it is only necessary that it should pass. Whether, in the circumstances of this case, property has passed is the main question of this appeal. The circumstances are unusual.

One John Weston Adamson died on March 11, 1928, leaving four children—one son and three daughters. On March 24, 1924, he executed an appointment of new trustees of a large sum of money, which was apparently already subject to a trust, of which there is no evidence. But by this deed of appointment the trusts were expressly defined, and they may be summarized as follows:—

The capital of the trust fund was to be divided among the settlor's children as the settlor should, in writing, direct. The income of the whole, or such part of the capital as had not been so dealt with, was to be paid or applied by the trustees for the benefit of all or any of the settlor's children in such manner and at such times as he should direct in writing, and so far as any direction should not extend the income was to be held as an accretion to the capital of the settled funds.

After the death of the settlor the capital and income of the funds not already distributed was to be held in trusts for his children living at his death at such ages and times and in such manner as he should, by deed or will appoint, and in default of appointment in trust as to two-fifths for his son, John

Weston Adamson, and the remaining three-fifths for equal division among his other children living at his death as tenants in common. If the son died before he attained a "vested interest" in the funds his share was to be added to the shares of the other children, and if there should be no children who attained a "vested interest" then in trust for the settlor's next of kin, according to the statute. The testator made no direction by writing deed or will, and the question is whether the property, subject to the trust, "passed" at his death. The Inland Revenue authorities claim that it did, and their claim has been supported by Rowlatt J. and the Court of Appeal. From this judgment the trustees have appealed to this House.

The provisions in this deed with regard to vesting suggest that its intention was that the property only vested at the date of the settlor's death, but I do not think that is its true interpretation. There was an interest in the children from the date of the creation of the trust, contingent upon the children surviving the testator, and liable to be divested in respect of any child by the exercise of the rights which the settlor reserved to himself. Any children born after the creation of the trust would enjoy a similar interest.

In these circumstances did the property pass on the settlor's death? It is argued on behalf of the trustees that as the property had already passed when the trust was created, all that remained was the power to define certain interests, or, in the absence of direction, their definition by death, but that does not appear to me to conclude the whole matter. Supposing the testator had appointed all the property by will to one child, according to the ordinary meaning of the word that would, I think, involve that all the interests under the settlement had passed to that child at the settlor's death. Before that event there was no interest under the settlement which that or any child could enjoy except the prospect of what might happen when the settlor died.

It is true that all the children together might have made a title supported by policies of insurance, but no one child could possibly do so.

In the case of the *Attorney-General* v. *Milne* (1) Lord Parker says that the expression " passing on the death " is evidently used to denote some actual change in the title or possession of the property as a whole, which takes place on death. It is said that this only means that, as, for example, in the gift of the fee simple of an estate, as the title was formerly in the testator, it would then change to that of the devisee. I think the phrase has a wider meaning. There was in this case a change of title at death. The title, which had formerly been contingent and liable to be divested, became absolute. It might have been in one, or more, or in all of the children, but the title had emphatically changed, and if their interests in the estate were regarded as the property, that property then passed. So also had the possession, if possession be the equivalent of the opposite of expectancy. In the case of *Attorney-General* v. *Beech* (2), where, a life tenant having surrendered a life interest to a son absolutely entitled in remainder, it was none the less sought to tax the property at the death of the former tenant for life, Lord Halsbury in rejecting this claim says (3) that after the surrender the son " was completely master of the situation, and he might have sold the property the very next day." It certainly is not desirable to rely on extracts from judgments delivered in other conditions as a rule or test to be applied in all cases; but it is at least plain that no individual child could be master of the property until the death of the settlor. Until that event the property was all subject to trusts which might have defeated any individual share. After his death it became free of the trusts, and, in my opinion, within the meaning of the statute it should then be regarded as passing to the children or child.

If this view should be wrong, I am also of opinion that the same result may be reached by regarding s. 2 of the statute, which provides that property passing on the death shall be deemed to include any interest provided by the deceased, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death.

(1) [1914] A. C. 765. (2) [1899] A. C. 53. (3) [1899] A. C. 57.

The interest here provided by the deceased was materially changed at his death from being an interest liable to be divested and contingent into an interest absolute and undefeatable, and that new interest arose on the death of the deceased.

Lord Warrington has prepared a Declaration to give effect to that opinion, and with that Declaration I am in agreement. I need add no more upon that part of the matter.

LORD BLANESBURGH. My Lords, it is unnecessary to set forth in detail the provisions of this so-called appointment of new trustees of March 24, 1924. The deed as a whole is under your Lordships' notice, and I shall have occasion to refer later to its place in the story of this trust. For the rest it will suffice if I draw attention to its general effect, so far as relevant to the question whether, as asserted by the appellants, the trust property passed, within the meaning of s. 1 of the Finance Act, 1894, on the execution of the deed or whether, as contended by the Crown, it so passed on the death of the settlor.

Except to an extent so insignificant that it may be disregarded, the settlor left the deed to operate without interference by him under any of his reserved powers. But even if there had been no such reserved powers to be exercised the interests of the named and living beneficiaries remained sufficiently precarious.

As to the settlor's son, it is true that he takes in his share, as originally fixed, an immediately vested interest, but that interest is liable to be defeated by his death in the settlor's lifetime. In effect therefore his interest is contingent on his surviving his father. That is in actual terms the position of each of the three daughters. In one respect only is the son in a less uncertain position than they. The birth of further children to the settlor would have reduced, in its proportion, the contingent share of each daughter. No additions to the settlor's family would affect the amount of the contingent share to be taken by the son.

But these original interests are relatively stable when they are contrasted with those which are left when the whole story is told. For the overriding powers reserved to the settlor to direct that the whole fund shall go to one or more of his children present or future to the exclusion of the others are wide enough to enable him to allocate the fund to all or some or one of these children for any interest and in any proportion he may think fit. Accordingly it becomes plain that so long as he lived it was impossible to predicate of any of his children that even contingently on survivorship he or she would take any interest whatever in the property. And it is with reference to property so circumstanced, and not with reference to it as in terms settled, that the critical question between the parties must be answered.

Now it is not in contest that the title to the property passed on the execution of the deed. This is, of course, asserted by the appellants; but it is not disputed by the Crown. The title, however, which so passed was the entire title—the title whatever it might ultimately be in the events which would ultimately happen—the titles of the son and the three living daughters certainly; but the titles also of any further children to be born to the settlor, or his statutory next of kin, if, in the event, he died without leaving a child; of his own legal personal representatives under the resulting trust to himself, if he died leaving neither child nor statutory next of kin, a remote but not in these days an impossible contingency. It is, I think, not unimportant to stress this point. At any rate it misleads me to treat the title of the son or of the three daughters which "passed" as being in any legal sense different in its essence from any of the other titles which also passed. The difference, as I see it, is a difference in degree only and not in kind. It is the unexpected which happens. If the supremely unexpected had happened in this case, the only title that in the end would have mattered would have been the settlor's under the resulting trust to himself. But the truth, as I see it, is that in point of law no one of the possible beneficiaries, existing or potential, ascertainable or not, had under his or her title any position different from that of any other, for the sufficient reason applicable to them all that from the moment of execution of the deed down to the moment of the settlor's death the titles which had respectively passed gave no one of them anything that could be reckoned. In this respect they were each and all in the same case.

Accordingly it is not, I think, in accord with the true position to say that all that happened on the settlor's death —for example, with reference to his son's share—was that a previous fetter on his enjoyment of it was then removed. It is not, I think, right to say that while his father lived he was in law in any stronger or other position in relation to enjoyment than any of the other beneficiaries actual or potential —the truth being that, although the title to the entirety was contingently under the deed amongst all the children for the time being alive, no one of them so long as the settlor lived had any right to say that his or her title gave him a right to anything at all. It has been suggested that the right the son or any daughter had during the settlor's life was a right that could have been insured against. Possibly ; but at a premium measured not by the mere chance of survivorship but by the danger that even on survivorship there might be nothing to receive. Technically it would not, I suppose, be correct to describe the interest of any child as being a spes successionis only. But many a spes successionis has at its initiation had a fuller promise of enjoyment.

And not less striking, as I think, is the result, if the true problem is to ascertain when it was that in enjoyment the property " passed." Take again the case of the son. Under the deed as drawn, and apart from any intervening act of the settlor, has anything in enjoyment passed to him while his father still lived ? The answer it seems must be in the negative. The position may be tested in this way. If the son died in the lifetime of the settlor, had any share of this property passed to him so as to become chargeable with Estate Duty as on his own death ? The answer must be No. But suppose further that his father the settlor had died on, say, some New Year's Eve, and he himself had died on the following New Year's Day, what then ? Clearly, in that event Estate Duty on his entire share would be chargeable as on property passing on his death. Why, it may be asked? The answer of the Crown is, because, by the death of the settlor, his father, the property had passed to him during the night. The question is whether that answer is correct. My Lords, I believe it is.

This deed has been very skilfully framed so that the settlor's estate may in the matter of Estate Duty be protected against the uncertainties of survivorship as between himself and his children. Its object very clearly was to relieve everybody in respect of the trust property of the burden of duty on the settlor's death, whether he survived all his children or whether all or any of them survived him. But the deed would have lost much of its value in the settlor's eyes if consistently with that advantage he could not have retained to himself the power to allocate the property amongst his children during his life or by his will as might seem to him to be proper. The settlor lived for more than three years after the execution of the deed. Mr. Greene in his reply suggested that this was an attempt on the part of the Crown to subject to duty the subject-matter of a gift made more than three years before the donor's death. I do not agree with him. This was not such a gift. It could not be said of this deed that the property comprised in it had been assumed by the donee immediately upon the gift or that it had thenceforward been retained to the entire exclusion of the donor. There was no ascertainable donee to assume it, and it was of the essence that the settlor's reserved powers over it should not be excluded so long as he lived. The very fact that it was, as I think, impossible consistently with the settlor's reservations to make of this deed "a gift" weakens the cogency of the appellants' present contention that the property had in fact passed at the date of the deed, so that there was nothing left to pass at the settlor's death.

My Lords, the correctness or otherwise of that contention must in my judgment be tested by the working out of this transaction in the world of reality, and not by its history in a world of abstractions. In my judgment, no thing worth that name in the world of reality passed here until the death of

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the settlor. The metamorphosis of the situation effected by that event has been shown. It was total. If the words of s. 1 of the Act are to be interpreted in their ordinary natural sense, only then was the "passing" complete. In my judgment the passing to be within the section is a process which is finished only when the property in respect of enjoyment or of the right to it reaches its prescribed destination.

It will have been noticed that the so-called appointment of new trustees was made on the narrative that the settlor had a considerable number of years before with reference to the trust property verbally declared himself to be a trustee in the very terms of the trusts which by the deed were thenceforth to be executed by the new trustees to whom, with himself still as trustee, the property was then assigned. If that assignment had not been made, and the settlor had continued up to his death to retain and administer the property in accordance with the identical trusts of his verbal declaration, it would, I think, have been difficult indeed to contend that the property "passed" a moment before the settlor's death, trustee though he was. Yet in principle there is no distinction I can see between that position and the position created by "the appointment of new trustees."

My Lords, the view I have taken is, I think, borne out by the authorities. *Attorney-General* v. *Beech* (1) is useful, because of the description it gives of the circumstances under which property does "pass" at the moment when it is conveyed. In that case there had been a disposition of her life interest by an equitable tenant for life in favour of her son, the immediate equitable remainderman in fee. "The moment that conveyance was made," said Lord Halsbury (2), "the son was completely master of the situation, and he might have sold the property the very next day." Lord Davey puts it thus (3): "When cestuis que trust become absolutely entitled to the trust funds in possession with power of disposition without the consent of any other parties, the settlement is at an end. . . . . There is no single test of ownership that can be applied to " [the son's] " position at that date " [after the assignment] " which shews that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before " [his mother's] " death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death. . . . . This is not a mere technical doctrine—it is the expression of a fact."

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(1) [1899] A. C. 53.
(2) [1899] A. C. 57.
(3) [1899] A. C. 60.

It is by invoking the same principle to the facts of this case that here I arrive at the conclusion that there was no " passing " until the settlor's death. I am further confirmed in that view by Lord Dunedin's description of what is meant by " passing " in *Attorney-General* v. *Milne* (1), where he says: " The word is here treated as a word of ordinary language . . . . a death occurs, and somebody in consequence gets property which he did not have before." Last of all I find strong support in this language of Lord Parker's in the same case. (2) After pointing out that the expression " passing on the death " by s. 22 of the Finance Act of 1894 includes " a period ascertainable only by reference to death," Lord Parker proceeds: " The expression ' passing on the death ' is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death."

My Lords, in these words as applied to the facts of this case I find full justification for all I have said.

In my judgment the Crown is right here, in this its main contention. But if the case, in the view of the House, is not brought within s. 1 then, accepting, as I must, that position, I am in agreement with my noble friend Lord Warrington of Clyffe, whose opinion I have had the advantage of reading, that it may be brought under s. 2, sub-s. 1 (*d*), of the Act with the consequences indicated by him.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal (Lord

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(1) [1914] A. C. 765, 774, 776.

(2) [1914] A. C. 779.

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Hanworth M.R. and Greer and Romer L.JJ.) dismissing an appeal from an order of Rowlatt J. dated June 15, 1931. By the last-mentioned order it was declared that upon the death of the settlor John Weston Adamson the elder Estate Duty became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the interest arising at the death of the settlor under an indenture of settlement dated March 24, 1924, to the four children of the settlor. The rest of the order (relating to Succession Duty) is not now complained of.

The settlor died on March 11, 1928, having one son (the appellant, John Weston Adamson) and three daughters. He also left his wife, who is still living. No child was born after his death.

Sect. 1 of the Finance Act, 1894, is as follows: "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called 'Estate Duty' at the graduated rates hereinafter mentioned."

Sect. 2, so far as it is material, is as follows: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—(*d*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

The order appealed from is not happily drawn. It purports to be under s. 1, but introduces an expression "to the extent of the interests, etc.," which is taken from s. 2, sub-s. 1 (*d*). It is clear, however, from the judgments of Rowlatt J. and of the members of the Court of Appeal, that their decision was based upon s. 1, and that s. 2, sub-s. 1 (*d*), was only relied upon as an alternative ground for an order in favour of the Crown, and the matter was so dealt with in argument before this House. The first question therefore is whether upon the true construction of s. 1 it can properly be said that the property, on the principal value of which the duty is to be levied and paid, passed upon the death of the settlor.

The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect—if it be in view of the Crown a defect—can only be remedied by legislation.

The property on which the duty is in this case claimed is of very considerable value—namely, 128,437*l.*, consisting partly of capital funds originally settled and partly of accumulations of income. It would appear from the recitals to the deed of March 24, 1924, that the fund had been constituted some years before that date, but that the trusts thereof were then for the first time formally declared. I need not refer in detail to the provisions of the deed; it is quite enough to give a summary of them.

Clause 2 is a general trust for investment which is left to the absolute discretion of the trustees within the range referred to in the deed. Clause 3 contains a direction to pay and apply the capital unto the children then living or thereafter to be born in such shares and manner and at such time or times as the settlor might direct in writing, and, in default, the capital was to be held upon the trusts following. Under this clause payments were made to certain of the children, and no question arises as to these.

Clause 4 provides for the application of the income for the maintenance and support or otherwise for the benefit of all or any of the children for the time being of the settlor as the settlor might in writing appoint. Any income not so applied was to be held upon the same trusts as were applicable and as an accretion to the capital of the funds.

Clause 5 provides that after the settlor's death the trustees were to stand possessed of the capital and income of the funds in trust for all or any one or more of the children of the settlor living at his death in such shares and so forth as he should by deed or will appoint, and in default as to two-fifths for the son and as to the remaining three-fifths for equal division among all the other children living at his death. It was further provided that if the son should die before he should attain a vested interest in the funds his two-fifths were to be added to the shares of the other children. There was an ultimate trust, in the event of no child of the settlor attaining a vested interest, for the settlor's next of kin under the Statutes of Distribution.

The result was that the property itself, both as regards ownership and possession, passed wholly out of the hands of the settlor upon the execution of the deed. It is true he retained some control over both income and capital as to the application thereof respectively for the benefit of the children. His power was, however, strictly limited. He could not lawfully exercise it directly or indirectly for his own benefit. Moreover, the ultimate trust in default of children was not for him but for his next of kin, according to the Statutes of Distribution, who would take as personae designatae.

It was indeed suggested that there might be a resulting trust for him in the event of all the children dying in his lifetime, and there being under the existing law no person entitled to take by virtue of the ultimate trust. It is, however, by no means clear that in such an event, remote and improbable as it is, there would have been a resulting trust, and the point may, I think, be ignored. In my opinion, under such circumstances, it is correct to say that after the execution of the deed no property remained in the deceased, and, if so, no property passed at his death.

The case is a very peculiar one and authorities are of little value. There is, however, a dictum of Lord Parker of Waddington in *Milne's* case (1) which, I think, rightly understood, supports the appellants' contention. He said: "Passing on the death is . . . . used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition

(1) [1914] A. C. 765, 779.

the property passes." I think the emphasis in this statement is on the words "as a whole," that is to say, for the purposes of s. 1 it is irrelevant to consider the several interests of the persons beneficially entitled. For these reasons I am of opinion that the appellants are correct in their main contention, and that upon the true construction of s. 1 of the Act the property did not pass upon the settlor's death.

But this does not conclude the matter. It is still necessary to consider the alternative claim of the Crown under s. 2, sub-s. 1 (*d*). This section, unlike s. 1, which deals only with property as a whole, brings within the ambit of the charge individual interests provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression "property passing on the death of the deceased," but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 be charged with duty accordingly.

The result, in my opinion, is that the appeal ought to be allowed and the order of June 15, 1931, discharged so far as it declares that upon the death of the settlor John Weston Adamson the elder, Estate Duty at the appropriate rate became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the interest in the settled funds and accumulations respectively arising at the date of such death to the four children of the settlor under the indenture dated

March 24, 1924, in the information mentioned, and that in lieu thereof an order should be made in the following terms :

" Declare that upon the true construction of s. 1 of the Finance Act, 1894, and in the events which have happened the settled funds and accumulations subject to the trusts of the indenture of March 24, 1924, in the Information mentioned were not property which passed on the death of the settlor and Estate Duty did not become leviable and payable upon the principal value thereof but Declare that upon the true construction of s. 2, sub-s. 1 (*d*), of the abovementioned Act the beneficial interest of each child of the settlor in the said settled funds and accumulations to the extent to which the principal value of such beneficial interest upon the death of the settlor exceeded the actual value if any of the expectant beneficial interest of each child prior to such death was an interest accruing or arising on his death, and is therefore to be deemed to be property passing on the death of the settlor and that Estate Duty on the principal value of such excess is leviable and payable accordingly.

" Remit the Information to the King's Bench Division with liberty to apply."

As to costs, I propose that as neither party wholly succeeds there should be no costs in this House, leaving, however, unaffected the orders as to costs in the Courts below.

LORD RUSSELL OF KILLOWEN. My Lords, clauses 2, 3 and 4 of the settlement declare the trusts which are to operate during the life of the settlor. Under clause 2 the capital and any income not applied under clause 4 are to be invested. Under clause 3 the capital is to be paid to or applied for the benefit of all or any of the settlor's children as he may from time to time in writing direct. Under clause 4 the income is to be paid to or applied for the benefit of all or any of the settlor's children as he may from time to time in writing direct, and in default of such direction the income is to be held upon the same trusts as are applicable to and as an accretion to the capital.

The trusts which are to operate after the settlor's death are declared by clause 5 and relate to the capital and income of "the settled funds which shall not have been paid in accordance with the directions hereinbefore mentioned." There is an overriding power in the settlor to appoint by deed or will in favour of all or any of his children living at his death, and subject to the exercise of that power the trust fund (capital and income) is to be held in trust, as to two-fifths for the settlor's son John, and as to three-fifths for the settlor's other children living at his death, share and share alike as tenants in common. There follows a proviso that if the son John died before attaining a vested interest (which in the circumstances must, I think, be construed as meaning vested in actual possession) his two-fifths share should be added to the shares of the other children of the settlor living at the death of the settlor. If no child attained a vested interest, there is an ultimate trust in favour of the settlor's statutory next of kin. There is no express disposition of the three-fifths share in the event of all the children (other than John) dying before the settlor, but a cross limitation in John's favour would probably, if the event happened, be implied from the form of the ultimate trust.

If the settlor should happen to die without having any statutory next of kin, there would be a resulting trust in favour of the settlor, and the trust fund in that event could pass under his will if he left one; but except for that remote contingency the settlor had by the settlement deprived himself of all beneficial interest in the settled fund, and made a gift of it to the cestuis que trust under the settlement.

The settlor died on March 11, 1928, without having exercised the special power conferred by clause 5 of the settlement, leaving his son John and three daughters him surviving. They were all living at the date of the settlement, and were the settlor's only children.

The Crown claims to be paid Estate Duty upon the principal value of the trust property which was in the hands of the trustees at the time of the settlor's death, on the ground that such trust property was either: (1.) property which passed

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on the death of the settlor within the meaning of s. 1 of the Finance Act, 1894, or (2.) property which, although not property passing on his death, must be deemed to be included in property passing on his death by reason of s. 2, sub-s. 1 (*d*), of that Act.

I will deal first with the contention that the trust fund was property which passed on the death of the settlor within the meaning of s. 1, bearing in mind that the property which is said to pass on the death is the trust fund then in the hands of the trustees, i.e., a trust fund composed of the original capital increased by accumulations of so much of the income as has not been paid or applied under clause 4, but less so much capital as has been paid or applied under clause 3.

What were the interests of the children under the settlement in that property immediately before the settlor's death ? The position of the son John would appear to be somewhat different from that of the other children. He was given an immediately vested interest in two-fifths of that property, but his interest was defeasible : (*a*) if his father exercised and to the extent to which he exercised the special power of appointment conferred by clause 5, and (*b*) if he died in the lifetime of his father. That was his exact position in relation to that property. When the settlor died the property did not in my opinion pass either from the settlor or to John. It did not change hands. The effect of the death was not to pass it to John, but to render impossible the happening of any of the events which would deprive him of his interest and make the property pass from him.

But then it is said that the father's death has conferred a benefit upon the son, or that the son succeeded to a benefit on his father's death in that his interest, which before the death would have been unmarketable in view of the overriding special power, has become readily saleable immediately after the death. That may well be, but that is not the element which according to s. 1 attracts the duty. In order to attract the duty under s. 1 the property must pass on the death. As Lord Macnaghten pointed out in *Earl Cowley* v.

Inland Revenue Commissioners (1), unless the case is within the precise terms of s. 1 you cannot say it is within its principle and bring it within the section unless it is one of the few cases specified in s. 2.

The case of the daughters differs in form, though not, I think, in substance, from the case of the son. In form the trust for them of the property, which is said to pass upon the settlor's death, is a contingent interest, contingent upon their surviving the settlor. It is not (as is the trust for the son) an interest vested but liable to be divested in the event of death before the settlor. The position immediately before the settlor's death was this: that each of the three daughters was entitled to a one-fifth share of the trust fund contingently on her and her two sisters all surviving the settlor. The contingent share of each daughter was liable to be increased if one or both of her sisters died before the settlor and to be diminished if any other child was born to and survived the settlor. These contingent shares to which each daughter was entitled were liable to be defeated if the settlor exercised and to the extent to which he exercised the special power of appointment conferred by clause 5.

That being the position immediately before the death, what happened when the settlor died? Did this property pass? If it did it must have passed to some one; to whom? The daughters were already entitled to it each for a contingent interest, which the father's death converted into a vested interest, and it was conceded in argument that the mere turning of a contingent interest into a vested interest, or a defeasible interest into an indefeasible interest, was not a passing of property.

So far as I can see, what happened on the death of the settlor was that the contingent interest of each daughter in a one-fifth share became a vested interest and ceased to be liable to be defeated by the exercise of the special power of appointment conferred by clause 5. This latter feature, however, adds nothing to assist the Crown, for the non-exercise of a power of disposition cannot in my opinion make property pass.

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(1) [1899] A. C. 198, 211.

Take the cases of two settlements of property which are executed a sufficient number of years before the death of the settlor and under which the settlor takes no interest. One is subject to a power of revocation and new appointment, a general power; the other is subject to a power of revocation and new appointment, but a special power. The settlor dies without having exercised either power. In neither case does any property pass on his death. It passed when the settlements were executed. Estate Duty, however, will be payable in the case of the property comprised in the first settlement by reason of s. 2, sub-s. 1 (*a*), not because property passes, but because the property, although it does not pass, is to be deemed included in property passing on the death.

It was, however, suggested that the words "passes on the death" in s. 1 might well cover the present case upon the footing that a process of passing commenced with the execution of the settlement when the property left the beneficial ownership of the settlor, that the process continued during his life while (as it was said) the beneficial ownership remained in suspense, and the passing reached its completion on the settlor's death when the children would come into physical possession and actual enjoyment of the trust fund. This is a highly artificial conception, and in my opinion the Act does not contemplate under s. 1 a passing commencing before the death, and s. 22 (*l*) lends support to this view.

It is not easy to state the grounds of the decisions in the Courts below. Rowlatt J. thought that the property passed within the meaning of s. 1, because the property came into a different ownership upon the death, i.e., before the death the owners were the class of children, whereas after the death the owners were the individual children, who turned out to be entitled. This view can, however, have no application to the son and his two-fifths; moreover, as regards the daughters, it seems to me unsound, and omits consideration of the fact that the daughters were each immediately before the death entitled to the definite contingent interests which I have described above.

The judgment of the Master of the Rolls turns, I think, upon the view that upon the death there was a passing of the right to possession of the property to the four children. Greer L.J. thought that the children succeeded to the property by reason of the terms of the settlement on the death of the settlor. Romer L.J. put the case of a settlement with trusts for the accumulation of the income during the life of the settlor and a provision that the accumulations should go to A. if he survived the settlor, and that the fund, the income of which had been accumulated, should go to B. He then stated that on the death of the settlor the property would pass to B., and that the present case ought to follow the same way. All these judgments appear to me to overlook the essential fact that from the inception of the settlement the settlor deprived himself of all beneficial interest in the funds, and that as regards the property now in question he declared trusts under which the four children at the time of the settlement took interests defeasible, but which on his death became indefeasible.

In my view the beneficial interest in the whole fund passed, on the execution of the settlement, from the settlor as to two-fifths to his son John and as to three-fifths to his three other children then alive, subject in the case of each beneficiary to the possibility of his or her interest being taken away or otherwise affected by the exercise of the special powers reserved to the settlor, or by the occurrence of certain events in his lifetime. His death merely abolished this possibility and made the beneficial interests indefeasible. Or the matter may be put in another way, thus: the particular interest in the fund which was vested in each child immediately after the settlor's death was the same as it was immediately before the death, except that by the death it became indefeasible.

Personally I cannot see my way to decide this case in favour of the Crown under s. 1 unless I am prepared to hold that property passes when a contingent interest therein becomes a vested interest or when a defeasible interest therein becomes indefeasible; and this I am not prepared to do.

Reliance was placed in the Courts below and in your Lordships' House upon extracts from speeches made here in debates upon other and wholly different cases, for the purpose of showing that s. 1 has been construed so as to include the present case. Thus Lord Halsbury is quoted as having said in *Attorney-General* v. *Beech* (1) that the son after the surrender to him of his mother's life interest "was completely master of the situation, and he might have sold the property the very next day," and this is used as a test by which you may decide that here the property did pass. Lord Halsbury, however, was not emphasizing the fact that the son's interest was free from restriction or readily saleable, but that the surrender of the life interest had made the son owner of the fee simple in possession. Further, a phrase of Lord Parker's in *Attorney-General* v. *Milne* (2) is quoted as showing that that eminent authority took the view that whenever any change of title to property takes place at death property passes within the meaning of s. 1. I cannot so interpret what Lord Parker said. As I read his statement he means no more than that when property passes there must be some change in the title to or possession of the property *as a whole* which takes place on the death. My Lords, I confess that I consider it a dangerous and unreliable practice to take fragments from speeches made in other cases away from their context and apply them as authoritative for the decision of a case the facts of which the authors could not have had within their contemplation; and the danger is well exemplified here where some of your Lordships cite Lord Parker's phrase in support of conflicting views.

Nor do I think that the trust fund can be brought within the description contained in s. 2, sub-s. 1 (*d*). The relevant words are these: "any . . . . interest . . . . provided by the deceased . . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." In my opinion, and for the reasons already

(1) [1899] A. C. 53, 57.

(2) [1914] A. C. 779.

stated, the beneficial interests of the four children neither "accrued" nor "arose" on the death of the deceased. They came into existence when the settlement was executed and were in existence immediately before the death. What happened on the death was not that they accrued or arose, but that they ceased to be defeasible.

I would allow the appeal.

Lord Wright. My Lords, this case has been argued upon the provisions of an indenture dated March 24, 1924, made between John Weston Adamson as settlor and the appellants, who are called the new trustees. This indenture has been conveniently referred to, and is herein throughout referred to, as the settlement, though in fact the trusts had been orally declared some time before. The settlor died in 1928. The first question is whether, as the Crown contends, the settled funds are subject to Estate Duty as settled property passing on death within the meaning of s. 1 of the Finance Act, 1894. The settled funds consisted of various stocks and shares of considerable value. The trusts on which in the settlement the funds were vested in the trustees may be thus summarized: (1.) The settlor was to have a power of appointment exerciseable by directions in writing both as to capital and income in favour of any or all of his children then born or thereafter to be born, but so far as the income was not so appointed the income was to be accumulated and held by the trustees as an accretion to the capital of the funds. (2.) After the settlor's death the settled funds, so far as not paid or applied in accordance with the settlor's directions, were to be held by the trustees in trust for all or any one or more of his children living at his death, in default of other disposition by him in favour of all or any of them, as to two-fifths for his son John Weston Adamson, and as to the remaining three-fifths for equal division among all his other children living at his death for equal division, share and share alike as tenants in common and not as joint tenants, subject to a provision for bringing into account in the case of any child of any moneys already directed or appointed to be paid to that child in accordance with the above powers of the settlor. (3.) If the son should die before obtaining a vested interest (that is an interest in possession) in the settled funds his two-fifths share was to be added to the shares of the other children living at the settlor's death. (4.) If no child of the settlor should attain a vested interest in the settled funds then they were to be held in trust for the persons entitled under the Statutes of Distribution as on an intestacy.

At the date of the settlement there were living the son and three daughters, and the same children and no others were living at the date of the settlor's death. The settlor made no directions after the settlement as to the settled funds, save in respect of three small sums paid by his directions in favour of the son and one daughter respectively.

Except for the remote contingency of a resulting trust in favour of the settlor in the event of all possible beneficiaries under the limitations in the settlement dying before the settlor, he reserved no beneficial interest for himself; as that remote contingency may be disregarded, the property, both legal and equitable, in the settled funds passed from him at the date of the settlement.

The appellants contend that the property in equity then passed to the son and the three daughters: as a vested right in the son, though liable to be defeated by exercise by the settlor of his limited power of appointment, and also liable to fail if he should predecease the settlor; and in the case of the daughters, as a right contingent on all or any of them surviving the settlor and likewise subject to defeasance by the exercise of the power of appointment. It is difficult to see any substantial difference between the positions of the son and of the daughters. The appellants contend that the beneficial right of the settlor when it passed from him on the settlement passed at the same time to the four children, though it passed as a right both contingent and defeasible. I think this contention is well founded. The section does not contain any definition of the words "passes on the death," and I have not found any real guidance on this point in any authority which has been cited. But s. 22, sub-s. 1 (*l*), of the

Act states that "'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation." By analogy, I think that in the present case the property passed on the settlement, though it did not pass immediately in the sense that the beneficiaries had enjoyment or mastery of it then, and though it did not pass certainly but only contingently, that is, subject to the risk of defeasance or of failure to survive. On any other view the beneficial right in the settled funds, with which alone the section is in a case like this concerned, must remain in suspense between the date of the settlement and the settlor's death, a view which does not appear to me to be well founded. Nor do I agree with the contention of the respondent that the passing of the property under the section means the passing or transfer of enjoyment or (if such a term be apt) of possession. I think the beneficial right became vested in the children at the date of the settlement, and all that happened on the death was that the right which had been future became presently vested in possession, so that what had been contingent became certain and what had been liable to be defeated became indefeasible. I do not think the words "property passing on death" are sufficient to attract the duty in such a case as this. Even if the case falls within what has been called the spirit and intention of the taxing provision, the matter falls to be decided on the meaning of the precise words used, according to the well recognized rule for construing taxing statutes. In my judgment the respondent fails in regard to his claim under s. 1.

There remains, however, the alternative claim under s. 2, sub-s. 1 (*d*). Sect. 2 differs from s. 1 in that whereas s. 1 imposes duty on the property as a whole, s. 2 is concerned with limited or particular interests in property; it also deals with subjects which fall outside the terms of s. 1 and are only brought within its taxing scope by a fiction; such subjects are "deemed" (that is notionally and contrary to the actual scope of s. 1) to be property passing on the death. The words relied on by the Crown are "other interest provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." It is clear that the children's interests became increased in present value when the risks of defeasance and of failure to survive ceased to affect them, as happened on the settlor's death. Though I have felt considerable doubt as to the true effect of this sub-section, I think on the whole that the appellants fail in their contention that the duty is not payable to the extent of the beneficial interest so accruing or arising, and in my judgment a valuation must accordingly be made to determine the amount so payable.

In the result I agree that the order which my noble and learned friend Lord Warrington of Clyffe has proposed should be the order made on this appeal.

Order of the Court of Appeal in part discharged; a Declaration made; a direction given as to costs.

Lords' Journals, Dec. 8, 1932.

Solicitors for appellants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitor for the respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

LAZARD BROTHERS AND COMPANY . APPELLANTS ;

AND

MIDLAND BANK, LIMITED . . . . RESPONDENTS.

H. L. (E.)*
1932
Nov. 28.

Banker—Russian Bank—Nationalization—Russian Decree—Foreign Law—Practice—Writ against Bank—Notice of Writ—Service of Notice—Rules of Supreme Court, Order IX., *r.* 2 ; *Order* XI., *r.* 8.

A question of foreign law is matter of fact to be decided by a judge, not by a jury, upon the evidence given at the trial in each case. Former decisions upon similar questions, but upon other evidence, are not binding.

Before the Bolshevik Revolution of October, 1917, in Russia the M. Bank in London owed a Russian Bank a large sum of money. At the same time the Russian Bank was largely indebted to L. Brothers, also bankers in London. Between October, 1917, and August 3, 1921, numerous decrees of the Government of Russia and orders of various Departments thereof were made and published purporting to nationalize or liquidate all banking corporations in Russia, including the Russian Bank above mentioned.

In October, 1930, L. Brothers, having filed an affidavit stating that the Russian Bank was a company registered and domiciled in Russia, obtained leave under Order IX., r. 2, of the Rules of the Supreme Court, to issue a writ against the Russian Bank and to serve notice of the writ by sending it by registered post to the former address of the Bank in Moscow. Having then signed judgment in default of appearance against the Russian Bank, L. Brothers obtained a garnishee order nisi against the M. Bank attaching all debts due from the M. Bank to the Russian Bank, and an issue was subsequently directed to be tried, whether the M. Bank was indebted to the Russian Bank to any and what extent.

On the evidence of Russian lawyers who had practised in Russia since the Revolution :—

Held, that the Russian Bank had ceased to exist in and before October, 1930, and that consequently the writ, the judgment and the garnishee proceedings were null and void and must be set aside.

Judgment of the Court of Appeal [1932] 1 K. B. 617 affirmed.

Russian Commercial and Industrial Bank v. *Comptoir d'Escompte de Mulhouse* [1925] A. C. 112, and *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* [1927] A. C. 95 distinguished.

Held also, that the procedure under Order IX., r. 2, was not in October, 1930, open to L. Brothers, inasmuch as at that date they had no option but to proceed under Order XI., r. 8. Decision of the Court of Appeal affirmed on this point also.

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* *Present :* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

Semble, the Court may in its discretion set aside an order made ex parte on an application supported by an affidavit which is in fact, though not intentionally, misleading.

APPEAL from the decision of the Court of Appeal (1) reversing the decision of Roche J. upon a garnishee issue in the following circumstances:—

Before the Bolshevik Revolution in Russia in October, 1917, the Banque Industrielle de Moscou (hereinafter called "the Moscow Bank"), a banking concern having branches at Petrograd and Moscow, kept current accounts with the Midland Bank, Ld., in the names of those branches, and at the end of 1917 those accounts were together in credit to an amount exceeding 300,000*l.* At the same time the Moscow Bank had accounts with Lazard Brothers & Co., bankers in London, and on these accounts they were indebted to Lazard Brothers & Co. in a sum which, though large, was less than that owed by the Midland Bank to the Moscow Bank.

In these circumstances Lazard Brothers & Co. applied under Order IX., r. 2, of the Rules of the Supreme Court (2) for leave to serve notice of a writ on the Moscow Bank by sending it by registered post to that Bank at Moscow, and supported their application by an affidavit sworn on October 24, 1930, by a member of Lazard Brothers & Co. This affidavit, after stating that the Moscow Bank was indebted to Lazard Brothers & Co. in a sum of 362,396*l.* 15*s.* payable in London, went on to allege as follows: (paragraph 6) "The intended defendants"—the Moscow Bank—"are a company registered in Russia and so far as I am aware have no address in this country where service of the writ can be effected. The intended defendants are domiciled in Russia and I am

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(1) [1932] 1 K. B. 617.

(2) Rules of the Supreme Court, Order IX., r. 2: "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just."

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advised and believe that there is no way of effecting personal service in Russia."

Upon this affidavit Branson J. in Chambers on October 27, 1930, made an order that Lazard Brothers & Co. should be at liberty to issue a writ of summons against the Moscow Bank, and to serve notice of the writ at Moscow by sending it by registered post to the Moscow Industrial Bank at Moscow in the Republic of Russia [*sic*] with an intimation that the time for appearance to the writ by the Moscow Bank should be twenty days after service of the writ.

In pursuance of this order Lazard Brothers & Co. on October 29, 1930, issued a writ against the Moscow Bank claiming 362,396*l.* 15*s.*, and addressed a letter to " The Banque Industrielle de Moscou, Moscow, Russia," informing the Bank that they had issued a writ against them and inclosing a notice stating the amount of the claim and requiring them within twenty days to defend the action by causing an appearance to be entered thereto on their behalf, and warning them that in default of their so doing they, Lazard Brothers & Co., might proceed in the action and judgment might be given in their absence.

On November 24, 1930, judgment in default of appearance was given for Lazard Brothers & Co. against the Moscow Bank for 364,471*l.* 17*s.* 2*d.* and costs to be taxed.

On November 28, 1930, Lazard Brothers & Co. received a letter from the Soviet Embassy dated November 27 returning two notices of the writ and stating that they could not be delivered because the Moscow Bank had gone out of existence during the Revolution of October, 1917.

On December 12, 1930, Lazard Brothers & Co. obtained a garnishee order nisi against the Midland Bank attaching all debts owing or accruing due from the Midland Bank, the garnishees, to the Moscow Bank, the judgment debtors, to answer the judgment of November 24. On the same day, December 12, a copy of this order was sent by registered envelope to Banque Industrielle de Moscou, Russia, but the envelope containing the copy of the order was returned by post marked " Unknown."

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On January 20, 1931, a garnishee issue was directed between Lazard Brothers & Co. as judgment creditors and the Midland Bank as garnishees, the issue being whether the garnishees were indebted to the judgment debtors, the Moscow Bank, to any and what extent at the time when the order nisi was served.

The issue was tried before Roche J. without a jury. The judgment creditors contended, among other arguments, that the judgment debtors, notwithstanding numerous decrees of the Russian Government and orders of various Departments thereof, still existed as a legal entity. The garnishees adduced evidence to the contrary, including that of two Russian lawyers who had practised in Russia under the Soviet regime, and in whose opinion the Moscow Bank had ceased to exist in and before 1930. The garnishees argued that the writ and the judgment were therefore null and void and that the garnishee proceedings must fall with them. They also contended that the procedure under Order IX., r. 2, was not open to the judgment creditors, and that their only course was to apply under Order XI., r. 8 (1); and that for this reason the

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(1) Rules of the Supreme Court Order XI., r. 8: "Where leave is given to serve a writ of summons or a notice of a writ of summons in any foreign country to which this Rule may by order of the Lord Chancellor from time to time be applied, the following procedure may" [until February 19, 1932, "shall"] "be adopted:

(1.) "The document to be served shall be sealed with the seal of the Supreme Court for use out of the jurisdiction, and shall be transmitted to His Majesty's Principal Secretary of State for Foreign Affairs by the President of the Division, together with a copy thereof translated into the language of the country in which service is to be effected, and with a request for the further transmission of the same to the Government of the country in which leave to serve the document has been given" . . . .

(3.) "An official certificate, or declaration upon oath, or otherwise, transmitted through the diplomatic channel by the government or court of a foreign country to which this Rule applies, to the English court, shall, provided that it certifies or declares the document to have been personally served, or to have been duly served upon the defendant in accordance with the law of such foreign country, or words to that effect, be deemed to be sufficient proof of such service, and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these Rules in that behalf.

(4.) "Where an official certificate or declaration, transmitted to the English court in manner provided in the last preceding section of this Rule, garnishee order nisi was a nullity and could not be made absolute.

Roche J. made an order absolute in respect of a sum of 335,230*l*. 14*s*. 7*d*. On an appeal by the garnishees the Court of Appeal (1) (Scrutton, Greer and Slesser L.JJ.) reversed the order of the learned judge, and held that the Moscow Bank had before 1930 ceased to exist as a juristic person and that, therefore, the writ and judgment, and consequently the garnishee proceedings, were null and void. The Court also held that the procedure under Order IX., r. 2, was not competent.

The garnishees appealed.

Oct. 20, 21, 24, 25, 27. *Stuart Bevan K.C.* and *August Cohn* for the appellants.

Wilfrid Greene K.C., *D. B. Somervell K.C.* and *F. J. Tucker* for the respondents.

The arguments of counsel sufficiently appear from the opinion of Lord Wright.

Nov. 28. LORD BLANESBURGH. My Lords, my noble and learned friend, Lord Buckmaster, who is not at the moment present, has authorized me to say that he agrees with the opinion in this case which is about to be delivered by my noble and learned friend Lord Wright. I also have had the advantage of reading that opinion, and I concur in it.

LORD WARRINGTON OF CLYFFE. My Lords, I also have had the same advantage, and I concur.

LORD RUSSELL OF KILLOWEN. My Lords, I also have had the advantage of reading the opinion of my noble and learned friend, and I agree with it, both in its conclusions and its reasons.

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certifies or declares that efforts to serve a document have been without effect, the Court or a Judge may, upon the ex parte application of the plaintiff, order that the plaintiff be at liberty to bespeak or request for substituted service of such document" . . . .

(1) [1932] 1 K. B. 617.

Lord Wright. My Lords, the present appeal is from an order of the Court of Appeal reversing an order of Roche J., who had made absolute a garnishee order nisi against the respondents, and had held that the respondents were indebted to the judgment debtors, Banque Industrielle de Moscou, to the extent of 542,730*l.* 14*s.* 7*d.*, and ordered that the respondents should pay to the appellants 335,230*l.* 14*s.* 7*d.* in part satisfaction of their judgment debt and costs. The Court of Appeal decided that the appeal should be allowed and that the judgment and order, together with the order nisi and the judgment signed in default of appearance, should be set aside, with costs; they also dismissed a cross-appeal by the present appellants.

The Banque Industrielle de Moscou (hereinafter called "the Industrial Bank") was at the time of the second or Bolshevist Revolution in Russia indebted to the appellants in large sums; it was at the same time also a creditor of the respondents in sums exceeding their debts to the appellants. Both these debts were English debts, payable in England and governed by English law. The Industrial Bank was a corporation carrying on business at Moscow as its domicil and head office, with branches at Petrograd and other places in Russia; it had no branches or shareholders outside Russia. The evidence in the action as to its formation was somewhat deficient, but it is clear that in 1916, having then assumed the name of the Moscow Industrial Bank in place of its previous name of J. W. Junker & Co., it was formed under articles, of which extracts were produced, by a law or statute of the Tsarist government. The Bolshevist Revolution took place in October, 1917; on December 27, 1917, following the decree of December 14, 1917, to be more fully referred to later, possession was taken of the Industrial Bank's Moscow office, its cash, securities and books, by a representative of the Government, accompanied by soldiers. The directors fled to the south of Russia, then outside the limits of Soviet domination, and in April, 1919, four directors were at Rostof on Don, which was not occupied by the Bolshevists till December, 1919. Before that happened, and before the four directors left Rostof on Don, they gave a power of attorney dated December 16, 1919, to one of their number named Alexander Chambers. In 1920 and 1921 letters were addressed to the respondents, signed by Chambers and one or more of his colleagues on the Board, with reference to the debts of the respondents to the Industrial Bank; on July 30, 1924, a letter was sent to the respondents on behalf of the Soviet Government stating that the Soviet Government claimed all sums standing in the respondents' books to the credit of former Russian banking and other nationalized companies—a claim which the respondents declined to admit.

On October 29, 1930, a writ was issued in the High Court of Justice, King's Bench Division, by the appellants against the Industrial Bank, claiming a sum of 362,396*l.* 15*s.* as debt and interest; an affidavit was sworn on behalf of the appellants, the terms of which will need consideration later. On that affidavit an order was made to serve notice of the writ by registered post to the Industrial Bank at Moscow. The notice of writ was accordingly sent by registered post addressed simply to the Banque Industrielle de Moscou at Moscow, on October 29, 1930. On November 24, 1930, judgment was entered for the appellants against the Industrial Bank for 364,471*l.* 17*s.* 2*d.* and costs in default of appearance. On November 28, 1930, the appellants received a letter from the Soviet Embassy dated November 27, 1930, returning the notices of the writ and stating that they could not be delivered in view of the fact that the Banque Industrielle de Moscou went out of existence during the 1917 October Revolution, and that the document had been delivered by mistake at the office of the Commercial and Industrial Bank of the Soviet Republic, which bank had only been formed in 1924 and had no connection with the former bank. On December 12, 1930, the appellants obtained a garnishee order nisi against the respondents; a copy of this was sent by the appellants to the Industrial Bank on the same date, but was returned by post marked "unknown." By an order of January 20, 1931, an issue was directed between the appellants as creditors and the respondents as garnishees. The issue came on for hearing before Roche J. in April, 1931. The learned judge dealt with three main questions :—

(1.) Whether the respondents' liability was barred by the Statute of Limitations, since more than six years before the garnishee order nisi demands had been made for payment by or on behalf of Industrial Bank. The respondents in support of this plea relied on the letters of 1920 and 1921 referred to above as being valid demands made on behalf of the Industrial Bank by its directors ; alternatively they relied on the notice from the Soviet Government of 1924 as a valid demand if it should be held that that Government had before that date succeeded to the rights of the Industrial Bank. Roche J. decided against that contention ; the matter was not the subject of decision in the Court of Appeal, it has not been argued before this House, and I express no opinion about it.

(2.) Whether the order nisi should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant, since the Industrial Bank had ceased to exist as a juristic person before the date of the writ.

(3.) Whether the order nisi should not further or alternatively be set aside on the ground that there was no proper service on the defendants, even if existent.

Roche J. decided questions 2 and 3 in favour of the appellants, the Court of Appeal decided both points against them, hence this appeal.

I shall deal first with question (2.), which is most important and is decisive, since it is clear law, scarcely needing any express authority, that a judgment must be set aside and declared a nullity by the Court in the exercise of its inherent jurisdiction if and as soon as it appears to the Court that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent : such a case is a fortiori than the case which Lord Parker referred to in *Daimler Co.* v. *Continental Tyre, &c., Co.* (1) There the directors, being all alien enemies, could not give a retainer. Lord Parker said : " But when the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed." In such a case the plaintiff cannot be before the Court. In the present case if the defendants cannot be before the Court, because there is in law no such person, I think by parity of reasoning the Court must refuse to treat these proceedings as other than a nullity. English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. Thus in *Henriques* v. *Dutch West India Co.* (1) the Dutch company were permitted to sue in the King's Bench on evidence being given " of the proper instruments whereby by the law of Holland they were effectually created a corporation there." But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact.

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(1) [1916] 2 A. C. 307, 337.

The Industrial Bank was a corporation established by an Act of the Tsar; but the governing authority in Russia, as recognized in the English Courts, is now and has been since October, 1917, the Soviet State. Soviet law is accordingly the governing law from the same date in virtue of the recognition de facto in 1921 and de jure in 1924 by this country of the Soviet State as the sovereign power in Russia. The effect of such recognition is retroactive and dates back to the original establishment of Soviet rule which was in the 1917 October Revolution, as was held by the Court of Appeal in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2) The question, therefore, is whether by Soviet law the Industrial Bank was at the date of the issue of the writ in this action, that is on October 27, 1930, an existing juristic person. What the Russian Soviet law is in that respect is a question of fact, of which the English Court cannot take judicial cognizance,

(1) (1728) 2 Ld. Raym. 1532, 1535.

(2) [1921] 3 K. B. 532.

even though the foreign law has already been proved before it in another case. The Court must act upon the evidence before it in the actual case. The recent enactment, s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that this question of fact must be decided by the judge alone instead of by the jury, if there be a jury, expressly treats the question as depending on the evidence given with respect to the foreign law. No earlier decision of the Court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case. On what evidence of the foreign law a Court can act has been often discussed. The evidence it is clear must be that of qualified experts in the foreign law. If the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation and adjudication: so in effect it was laid down by Coleridge J. in *Baron De Bode's* case (1); in the *Sussex Peerage* case (2), Lord Denman stated his opinion to the same effect as he had done in *Baron De Bode's* case. (1) He said that if there be a conflict of evidence of the experts, "you (the judge) must decide as well as you can on the conflicting testimony, but you must take the evidence from the witnesses." Hence the Court is not entitled to construe a foreign code itself: it has not "organs to know and to deal with the text of that law" (as was said by Lord Brougham in the *Sussex Peerage* case (3)). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony.

Hence in the present case it is necessary to consider the testimony of the two principal legal witnesses in the matter in order to ascertain the Soviet law. The one is Mr. Samuel Dobrin, who had been a member of the Russian Bar in Tsarist days, but remained in Russia till 1925, practising as a lawyer in Soviet Russia, and since then acting in this country as legal adviser on Soviet law to various Soviet institutions; he was called by the respondents. The other is Mr. S. L. Konkevitch, called by the appellants, who also had practised as a barrister in the Tsarist Courts, but had remained in Russia till 1919 practising in Soviet law, and as legal adviser to Soviet institutions. The respondents also called Mr. Alexander Hoelfern, who had practised as a lawyer in Russia in Tsarist times, but had left Russia in December, 1918. I do not attach the same weight to his evidence, because, though his qualifications and standing as a Tsarist lawyer are very high, he has not had, in my judgment, the same practical experience in regard to Soviet law.

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(1) (1845) 8 Q. B. 208, 266.

(2) (1844) 11 Cl. & F. 85, 116.

(3) Ibid. 115.

Before I examine the evidence of Mr. Dobrin and Mr. Konkevitch in detail I wish to advert to two matters taken by the appellants by way of objection. One was that the question of the existence or non-existence of the Industrial Bank was not raised specifically either on what corresponded in the case to pleadings or before Roche J. Roche J. did, however, consider it, and in any case the question was put in the forefront in the Court of Appeal, without any application being made by the appellants for an amended pleading or for an adjournment to call further evidence. I am satisfied that each of these two witnesses gave full evidence on the question. The appellants further relied on a decision of this House in the case of the *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1) (hereafter called the *Mulhouse* case), in which it was decided that a Russian bank had not been dissolved by the Soviet legislation; but the question in that case was whether the dissolution of the bank had taken place at the date of the writ in that action, which was January 23, 1920. Apart, therefore, from the consideration that the question was one of fact to be decided by each Court on the evidence before it, the question in that case was quite different, since the issue in the present case is whether the Industrial Bank had been dissolved by October 29, 1930. The world has not stood still between 1920 and 1930, least of all in the revolutionary ferment of Soviet Russia.

(1) [1925] A. C. 112.

It is true that with certain exceptions the same decrees were put in evidence in the *Mulhouse* case (1) as in the present case, though these additional decrees put in before your Lordships were not unimportant; but the evidence of the experts was different in most essential respects: the eminent Tsarist lawyers who gave evidence in the *Mulhouse* case (1) spoke from the standpoint of the law which they knew rather than of the Soviet law of which they had not experience; indeed, Soviet law had not then developed as it has now. Hence the whole matter has now to be reconsidered in the light of new evidence and of the historical evolution of ten years.

I think the same observations may be applied in connection with a further decision of this House—*Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (2)—which dealt with Russian insurance companies as in 1923, and decided that such companies were not dissolved by Soviet legislation. In the same way certain other decisions of the High Court to the same effect in relation to Russian shipping and industrial companies may have to be reconsidered if similar questions again come for decision.

In the present case Mr. Dobrin and Mr. Konkevitch, in giving evidence as to what Soviet law is, are, in my judgment, agreed on the essential fact that in October, 1930, the Industrial Bank had ceased to exist in Russia by Soviet law. I shall quote a few short answers from each witness. I have carefully considered their evidence as a whole and find it in harmony with these brief extracts.

Mr. Dobrin, giving evidence on behalf of the respondents, was asked in re-examination and answered as follows:—

"(Q.) Can you as a Soviet lawyer conceive of the existence of any of these private banks now?

(A.) In so far as they have no branches abroad, no, I cannot.

(Q.) In Russia would they admit the existence of any of the private banks?

(A.) I do not think so.

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(1) [1925] A. C. 112.

(2) [1927] A. C. 95.

(Q.) Since when has that been the case: when was the latest date, in your view, that Russia would have admitted the existence of the private banks?

(A.) Perhaps I am myself a good example of this. Until 1925 when I came to this country the question never occurred to me whether the banks existed.

(Q.) You mean that it did not occur to you that they could exist: is that what you mean?

(A.) There was no occasion after the actual liquidation in 1921 when all traces disappeared of the Bank in Russia. What could remain of the Bank after that?"

Mr. Konkevitch, called by the appellants, in cross-examination gave the following answers:—

"(Q.) Then I want to know this. Did the Bank continue to exist in Russia?

(A.) In what sense?

(Q.) In the sense as a legal entity?

(A.) I think I answered that question that in Russia a Court would not sustain an action by a bank. Did not I make that clear? If not, I shall be very glad to make myself more clear than I was.

(Q.) You mean that in other words the banks in Russia would not be held to have a legal existence?

(A.) Yes, that is my view.

(Q.) And you know that has been the view put forward in the letters which I have read to-day from the Soviet authorities?

(A.) Yes. . . . .

(Q.) Would you hold the view as a Soviet lawyer that the Bank has been nationalized and has been non-existent both de jure and de facto since 1917?

(A.) In Russia?

(Q.) Yes, that is what I am asking.

(A.) That is the interpretation of the Russian decrees as adopted by the Russian Courts."

Somewhat later the same witness said: "The company does not exist according to Russian law. I speak as a Russian lawyer." He adds when asked: "(Q.) The company does not exist ?—(A.) As interpreted by Soviet Courts. That is always the qualification I make." I understand the witness to be making some reservation as to what the English law might be in view of the decision of the *Mulhouse* case. (1) But that does not affect his evidence, since the question is what is the Soviet law.

I think this testimony, given from the witnesses on both sides, compels the conclusion of fact that the Industrial Bank was by Soviet law, which is the material law, non-existent in Russia in 1930. Mr. Dobrin reserves the question in respect of Tsarist banks which had branches or shareholders or assets outside Russia; but, as Mr. Konkevitch points out, what is there involved is a question of conflict of laws, not of Russian law; it is, however, not easy to see how a non-existent person (since if a corporation exists at all it must be by the law of the country of its incorporation) can have anywhere a branch or assets or shareholders; no question is here involved of the extra-territorial effect of legislation, confiscatory or otherwise, since the dominant fact is the dissolution of the corporation, which depends on territorial enactments of the country of incorporation according to which either the existence or the non-existence of the corporation is recognized by the law of other countries. It is not, however, here necessary further to pursue these questions; they do not arise in regard to the Industrial Bank, which never had branches abroad, nor, so far as evidence goes, any shareholders outside Russia; nor do I think it necessary to express any opinion about the status of assets in England, a matter not in these proceedings, but which no doubt will need full consideration in the future.

I ought, however, very briefly to state what I apprehend to be the evidence of these two witnesses as to the written law, that is, the Soviet legislation dealing with the Tsarist banks. Before Roche J. there were in evidence the various decrees or orders which were in evidence in the *Mulhouse* case (1), and are printed in the report of that case in the Court of Appeal. (2) Both witnesses agree that the initial decree of December 17, 1917 (which is clearly in their opinion to be recognized as a legislative act though a decree of the Central Executive Committee), was more than a declaration of policy; they differ, however, in that Mr. Konkevitch regards it as a decree there and then dissolving the Tsarist banks de facto and de jure, whereas Mr. Dobrin states his opinion to be that it was an order for the executive to begin the destruction of the old banks "by that national rule which was called nationalization"; his opinion is that it was not until nationalization was complete that the banks ceased to exist, and he finds in a circular of August 3, 1921, issued by the department of the Ministry of Finance official confirmation that the nationalization of the old banks was then complete; hence, he says, there was then an end of the banks. This circular, which was not before this House in the *Mulhouse* case (1), referred to a date subsequent to the issue of the writ in that case. Mr. Dobrin draws a distinction in Soviet law between "nationalization" and "liquidation." The latter term is technically used, according to his testimony, not as English lawyers use it or as Tsarist lawyers used it, that is, as meaning a process of winding-up; it means, he says, destruction or dissolution, and, indeed, in that sense is applied not only to corporations and institutions, but even to individuals: thus a man or class obnoxious to the Government is said to be liquidated. Nationalization, on the other hand, means the reduction of the affairs of the company into the possession of the Soviet State, a process involving, until it is completed, according to Mr. Dobrin, the prolongation of the company's existence. Mr. Konkevitch, while agreeing on the meaning of the words in Soviet law, puts the "liquidation" as complete on December 17, 1917, and treats the "nationalization"—which he agrees went on till April, 1921—as an operation subsequent to the dissolution of the company, as an administrative management and reorganization of the assets and businesses which had belonged to liquidated companies all over Russia, but had been brought within the State domain; this process, according to his evidence, did,

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(1) [1925] A. C. 112.

(2) [1923] 2 K. B. 630, 674.

(1) [1925] A. C. 112.

indeed, as was natural, take some years, but was a practical matter not relevant to the legal questions of the date when dissolution took place.

It is not necessary to decide between these conflicting views of theory, since, as I have stated, both witnesses are agreed in the view of the Soviet law that long before 1930 all traces of the Tsarist banks had vanished. Indeed, it would have been strange if, after the sweeping declarations, in the decrees and orders of the Soviet Government put in evidence before the Court, of their intention and policy to abolish private banking, there had been a complete failure of that intention and policy. The Soviet Government even went further, and by the decree of January 19, 1920, abolished the People's Bank (formerly the State Bank) with and in which by the decree of December 17, 1917, the joint stock banks were or were to be amalgamated and merged, and transferred all its assets and liabilities to a State department called the Central Budget and Accounts Administration. Later on it seems that the Soviet Government proceeded to establish national banks, since the writ in the action was delivered by mistake to a bank of the Soviet State called the Commercial and Industrial Bank, which came into existence in 1924. The view that a corporation like the Industrial Bank could only be dissolved by a specific decree (which was the opinion of some witnesses in the *Mulhouse* case (1)) was rejected both by Mr. Dobrin and Mr. Konkevitch. They pointed to a decree of the All Russian Central Executive Committee of November 30, 1918, forbidding reference in decisions and judgments to laws of overthrown—that is the Tsarist or Kerensky—governments, and also to the terms of the Civil Code of 1923 which forbade the Soviet judicial or other institutions to consider disputes over civil legal relations which arose before November 7, 1917, and which also forbade interpretation of provisions of the Code on the basis of laws of overthrown governments and of practice of pre-revolutionary Courts. Neither of these enactments was before the Court in the *Mulhouse* case. (1) In the Court of Appeal, but not before Roche J., there were also produced (without objection) further provisions of the Soviet Civil Code of 1923 which showed that juristic persons could only be recognized if their statutes were recognized, confirmed, and in proper cases registered, by the Soviet authorities. In the absence of testimony from Soviet lawyers as to these provisions, their meaning may seem ambiguous; the fair inference may be that they refer to new companies formed under Soviet rule, the Tsarist companies having disappeared from legal ken. But in the absence of expert evidence I do not feel justified in attributing any particular effect to them.

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(1) [1925] A. C. 112.

I have not thought it necessary to pursue in detail the examination by the legal witnesses of the various decrees, nor to emphasize the various differences between their testimony and that before the Court in the *Mulhouse* case. (1) I may mention the evidence as to the decree of January 26, 1918, described as " confiscating the share capital of the former Joint Stock Banks." The evidence now is that the declaration that all bank shares were declared null and void refers to the shares in the sense of " choses in action," the property of shareholders. But this very summary survey of the evidence in the present case is enough to show how very different that evidence is from that before this House in the *Mulhouse* case (1), just as the issue to which it is directed, that is the legal position at the dates of the respective writs, is so very different. In my judgment the conclusion is now inevitable that the Soviet Embassy were substantially right in the statement which they made by their letter of November 27, 1930, in returning the writ in this action that it " could not be delivered to the addressee in view of the fact that the Banque Industrielle de Moscou went out of existence during the course of the 1917 October Revolution." At what precise period of that Revolution the end came is no doubt the subject of diverse views on the part of the two legal witnesses, but that matter, though presumably of great theoretic interest to Soviet lawyers, appears to me to be immaterial for the decision of this case, since I am clearly of

(1) [1925] A. C. 112.

opinion that the dissolution or "liquidation" came long before October, 1930.

This conclusion is sufficient without more to carry with it the result that the writ, the judgment and the garnishee proceedings must be held of no effect and be set aside. But I desire to deal with the other question which has reference to the service of the writ. There is perhaps some artificiality in now discussing this question, since to do so it must be assumed that the Industrial Bank had some sort of existence, that it was something which might well be called nominis umbra: it clearly had no address, no shareholders, no directors, no tangible or discernible existence. How such a disembodied spirit could be served might appear to present a serious problem. That problem was however grappled with in an affidavit sworn on behalf of the appellants, dated October 24, 1930, in order to support an application for leave to serve notice of the writ on the Bank "by sending the same by registered post to the intended defendants at Moscow." The affidavit did not venture to suggest that the intended defendants had any address in Moscow or that there was the slightest probability that such a letter would reach the Bank, which was described as a "Company registered in Russia." The affidavit did indeed say that the whereabouts of any directors or other persons who in 1917 had been entitled to sign for the Bank were unknown, and that all of them, according to the deponent's information and belief, "had been deprived of their powers of representing the intended defendants by decrees of the Russian Government." No doubt the professional advisers who prepared the affidavit were influenced by the decisions of the Courts that Russian banks had not been dissolved and perhaps were following precedents used in other such cases, but even so, in my judgment, the whole position ought to have been more candidly and fully explained; in particular the phrase that the Bank was a company registered in Russia is singularly infelicitous. There is not the slightest suggestion of bad faith made, but I cannot acquit those concerned of falling short in regard to the obligations which rest on persons seeking the order of the Court for service out of the jurisdiction. That such an order is a serious matter is obvious, and it is one which only a judge of the High Court can make. The Court has discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure. I think in this case there was sufficient ground to call in play the discretion of the Court to set aside the order for service and justify the Court in refusing in the exercise of its discretion to treat the judgment as a sufficient foundation for a garnishee order as in the case suggested by Viscount Cave L.C. in the *Sedgwick, Collins* case. (1) In particular the words " the intended defendants are domiciled in Russia " may be most misleading, even if no intention existed to mislead. What is suggested is a " domicil "—an address where but for other difficulties personal service could be effected, and a suggestion is implied that the method of service might fairly be expected to bring to the proposed defendants the notice of the writ. Even if the Bank existed, it must have been known that it existed as a mere shell, incapable of action or of being affected with notice.

But there is an even more serious blot on the affidavit: it states " there is no way of effecting personal service in Russia," and on that basis asks for leave to serve notice of the writ " by sending the same by registered post to Moscow." No reference is made to the procedure under Order XI., r. 8, which by order of the Lord Chancellor, dated March 21, 1906, was applied to the " Russian Empire " : that order has never been cancelled : it originally referred to the territorial jurisdiction of what was up to 1917 the Russian Empire but is now the Union of Soviet Republics. This internal change in the system of government, once the new Government is recognized by this country, has no effect in the external status of Russia quoad this country as a personality in International Law. The identity of the State remains the same for international purposes : the change from monarchy to republic does not, in general, abrogate treaties or conventions, any more than loss of or increase in territory. The order of the Lord Chancellor accordingly still applies to Russia and could and should have been invoked for the purpose of effecting service there. The order has in fact been frequently used in recent years, with the full concurrence and co-operation of the Soviet Government, as appears in the evidence given before Roche J. and the Court of Appeal by Mr. Hinton, Official Process Server to the Supreme Court. The only excuse given on behalf of the appellants for the statement in their affidavit is that they did not realize the applicability of Order XI., r. 8; but here again they failed in performing their duty to the Court; they should have inquired more carefully. If the procedure under Order XI., r. 8, had been employed, there would, according to the usual course, have been an official certificate or declaration transmitted through the diplomatic channel by the Soviet Government to the English Court, reporting the impossibility of service much to the same effect as was done in the letter from the Soviet Embassy of November 28, 1930, and if on that a request was made for substituted service under Order XI., r. 8, sub-rr. 4 and 5, the judge would then have had the true position before him to enable him to decide how to act. But on this point the matter does not depend on the discretion of the judge: Order XI., r. 8, where it applies, was at the material time mandatory, not permissive —the words were, before the change since made by the Rules Committee which substituted " may " for " shall "—" the following procedure shall be adopted ": this word " shall " is to be compared with the use of " may " in other parts of the order where a discretion was intended. The result is that, quite apart from the want of accuracy in the affidavit, the order for substituted service was made by an incompetent procedure and was a nullity. Hence the judgment in default of appearance, based on such service, was itself a nullity and with it all the garnishee proceedings fall to the ground. For that reason alone the appeal must fail: indeed, the respondents were not called upon to reply on this part of the case. I have not adverted to some minor irregularities in the proceedings.

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(1) [1927] A. C. 95, 102.

In my judgment the appeal should be dismissed with costs.

H. L. (E.)
1932
LAZARD BROTHERS & CO.
v.
MIDLAND BANK.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 28, 1932.

Solicitors for appellants: *Linklaters & Paines.*
Solicitors for respondents: *Coward, Chance & Co.*

[HOUSE OF LORDS.]

KEANE AND OTHERS (PAUPERS) . . . APPELLANTS;

AND

MOUNT VERNON COLLIERY COMPANY, LIMITED . . . . . RESPONDENTS.

H. L. (Sc.)*
1933
Feb. 27.

Workmen's Compensation—Partial Dependency—" Ordinary Necessaries of Life "—Suitability for " Class and Position "—Right of Arbitrator to use judicial Knowledge—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 4, *sub-ss.* 1, 2.

A miner met his death through an accident arising out of and in the course of his employment. At the time of his death his earnings were 3*l.* 5*s.* a week in gross, or 3*l.* 2*s.* 4*d.* after the usual deductions. He lived with his father and mother, who received as unemployment benefit 17*s.* and 9*s.* a week respectively, and two sisters whose net wages were 21*s.* 8*d.* and 19*s.* 3*d.* a week respectively. The father, mother, and sisters claimed compensation under s. 4 of the Workmen's Compensation Act, 1925, alleging that they were dependent partially on contributions from the deceased member of the family for the provision of the ordinary necessaries of life suitable for persons of their class and position. All the earnings of the family were dispensed among the members by the mother, and nothing was saved.

The mother was admitted to be a partial dependant. With regard to the father and the sisters, the Sheriff-Substitute stated in a case for the opinion of the Court of Session (*a*) that for a family of five adult persons of the class and position of the claimants the sum of 17*s.* weekly per person, or a total of 4*l.* 5*s.*, was sufficient for the provision of the ordinary suitable necessaries of life; (*b*) that in arriving at this finding he had taken into consideration both the evidence led in the hearing before him and also his own judicial knowledge of local conditions and the average wages of miners employed in the district; (*c*) that consequently neither was the father nor were the sisters or either of them dependants of the deceased man:—

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Held, by Lord Buckmaster, Lord Warrington of Clyffe, Lord Russell of Killowen, and Lord Macmillan (Lord Blanesburgh dissenting), that the Sheriff-Substitute had not misdirected himself in any respect, and that there was no reason for disturbing his findings.

Held, by their Lordships unanimously, that the Sheriff-Substitute was entitled to use his own judicial knowledge of local conditions in arriving at his decision.

Kennedy v. *Hordern Collieries* [1925] 2 K. B. 438 considered;
Welsh Navigation Steam Coal Co. v. *Evans* [1927] A. C. 834 followed;
Peart v. *Bolckow, Vaughan & Co.* [1925] 1 K. B. 399 approved.

Interlocutor of the Second Division of the Court of Session, 1932 S. C. 492, affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session (1) pronounced upon a case stated by the Sheriff-Substitute of the Sheriffdom of Lanarkshire and Airdrie, who had made an award in favour of the respondents in a claim under s. 1 of the Workmen's Compensation Act, 1925, by Thomas Keane the father, Annie Keane the mother, and Catherine Keane and Hannah Keane the sisters, all of whom claimed to be dependants of Michael Keane deceased partially dependent upon him within s. 4, sub-ss. 1 and 2, of the Act. (2)

The case stated by the Sheriff-Substitute was as follows:—

(1.) The deceased Michael Keane (hereinafter referred to as "the deceased") was on December 6, 1930, in the employment of the respondents as a coal-cutting machineman, his average gross earnings being 3*l.* 5*s.* weekly, or 3*l.* 2*s.* 4*d.*, after making the usual deductions.

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(1) 1932 S. C. 492.

(2) By s. 4, sub-s. 2, of the Workmen's Compensation Act, 1925: "A person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

(2.) On the said date the deceased sustained fatal injuries which were admittedly caused by an accident arising out of and in the course of his employment.

(3.) The claimant Thomas Keane, aged fifty-four, is the father of the deceased; the claimant Annie Handley or Keane, aged fifty-one, is his mother; and the claimants Catherine Margaret Keane, aged twenty-three, and Hannah Maria Keane, aged eighteen, are his sisters.

(4.) At the time of the deceased's death the four claimants above named and the deceased were living in family together, and there were no other members of the family.

(5.) The respondents (the employers) admitted that the claimant Mrs. Keane was a partial dependant of the deceased, and tendered her the sum of 175*l.* in settlement of her claim.

(6.) Until about two years before the death of the deceased the claimant Thomas Keane had been employed as a coal-cutting machineman, but thereafter, owing to a serious illness, he was unemployed and was still unemployed at the date of the deceased's death.

(7.) At the said date the claimant Thomas Keane was receiving unemployment benefit at the rate of 17*s.* weekly for himself and 9*s.* weekly for his wife, and the claimants Catherine Margaret Keane and Hannah Maria Keane were earning gross wages of 22*s.* 6*d.* and 20*s.* per week respectively —the net amount which they received each week after deduction of health and unemployment insurance contributions being 21*s.* 8*d.* and 19*s.* 3*d.* respectively.

(8.) The practice of the deceased and of his father and sisters was to hand over all the money they received each week to the claimant Mrs. Keane, who in turn paid the rent, defrayed the household expenses, and provided herself and the other members of the family with clothes and pocket-money. All the money received by Mrs. Keane from week to week was spent in this way. Nothing was saved.

(9.) The total weekly sum received by Mrs. Keane before the death of the deceased was 6*l.* 9*s.* 2*d.*, and since his death 3*l.* 6*s.* 10*d.* She and the other surviving members of the family are thus worse off than they were while the deceased was alive. Mrs. Keane stated, and I accepted her evidence, that she is not now able to buy the same quality of food as before, and that her daughters are not able to go to so many dances or picture-houses, and do not get so many clothes as formerly.

(10.) The deceased's funeral expenses were defrayed out of the proceeds of insurance policies.

(11.) For a family of four or five adult persons in the class and position of the claimants the sum of 17*s.* weekly per person (or a total of 4*l.* 5*s.* in the case of a family of five) is sufficient for the provision of the ordinary suitable necessaries of life.

In arriving at the last finding of fact (No. 11) I took into consideration the evidence led in the present case, and also my own judicial knowledge of local conditions, and of the average wages of miners employed in this district.

I found in fact and in law that the claimants other than Mrs. Keane were not to any extent dependent on the deceased for the provision of the ordinary necessaries of life suitable for persons in their class and position, and were accordingly not dependants of the deceased within the meaning of the Workmen's Compensation Act, 1925.

Further I found in law—

(1.) That the claimants other than Mrs. Keane were not entitled to receive compensation from the respondents in respect of the death of the deceased.

(2.) That the claimant Mrs. Keane was entitled to receive as compensation a sum reasonable and proportionate to the injury she has suffered through the cessation of the deceased's contributions towards providing her with the ordinary necessaries of life.

I therefore awarded the sum of 100*l.* sterling to the claimant Mrs. Keane, and quoad ultra refused the prayer of the petition. I found the respondents entitled to expenses.

The questions of law for the opinion of the Court are :—

(1.) On the facts above stated was I entitled to hold that the claimants other than Mrs. Keane were not to any extent dependent on the earnings of the deceased in the statutory sense ?

(2.) Having regard to the respondents' admission that Mrs. Keane was partially dependent on the deceased's earnings, was I exonerated from inquiring as to the standard of life among persons in her position and class ?

(3.) In arriving at finding No. 11 was I entitled to make use of my own judicial knowledge of local conditions ?

The Second Division (Lord Anderson and Lord Blackburn ; Lord Morison dissenting) held (1) that the Sheriff-Substitute had followed the procedure enjoined by the statute and elaborated in *Kennedy* v. *Hordern Collieries* (2), approved in *Welsh Navigation Steam Coal Co.* v. *Evans* (3), and had properly taken into consideration the weekly expenditure of a family of the class and position of the claimants ; and that it was well settled that an arbitrator awarding compensation under the Workmen's Compensation Act, 1925, might use his judicial knowledge of local conditions. The award was therefore affirmed. Hence this appeal.

1932. Nov. 25. *James Walker* and *J. G. Leechman* (both of the Scottish Bar) for the appellants. The Sheriff-Substitute, acting as an arbitrator under the Act, has pursued a wrong train of inquiry and so has reached a wrong conclusion. He has called his judicial experience of local conditions to witness, and on data supplied by that experience he has arrived at the amount of 4*l.* 5*s.* as sufficient to provide for the ordinary suitable necessaries of life for a family of five adult persons in the class and position of the appellants. He has arrived at this figure by assessing the expenditure of each member of the family at 17*s.* a week. This is not the proper way of approaching the question. The appellants are not joining in one claim. Each dependant is a separate claimant and is entitled to have his or her claim separately considered and the evidence in each case considered with reference thereto. When the amounts sufficient to provide the ordinary suitable necessaries of life for the father, the mother, and each of the daughters have thus been separately ascertained the sum of the several amounts will be the amount to which the family is entitled. For ascertaining the proper amount in each case the appellants would suggest the standard applied by His Honour Judge Moore in *Kennedy* v. *Hordern Collieries* (1)—namely, that standard which is sanctioned by the head of the family as prima facie the judge of the scale of expenditure suitable to their position. The award of the learned county court judge in that case was approved by the Court of Appeal. (2) It contains the following passage (3): "No doubt, a very considerable number of miners' families have to live on very much less, but . . . . that is not a sufficient ground for saying that it is more than what is required to supply a particular family with the ordinary necessaries suitable to the father's class and position." The standard thus laid down has been approved in this House in *Welsh Navigation Steam Coal Co.* v. *Evans* (4), where Lord Dunedin said: "You are to find out what a family budget fitting to the class and position would naturally be. I agree that their expenditure is a prima facie guide." Here the family budget included the total income of its members and nothing was saved out of it. It follows that it was spent on ordinary necessaries. That income amounted to 6*l.* 9*s.* 3*d.* a week. Out of this the deceased workman contributed 3*l.* 2*s.* 4*d.* a week, or nearly one-half. The inference is that each of the survivors received maintenance to some extent from the late member and to that extent were dependent upon him. This being the prima facie conclusion, it is submitted that the learned arbitrator has not displaced it by applying his judicial knowledge of the wages of miners employed in the district. It is not the income but the expenditure which is here material, and mere knowledge of local conditions will not supply information on that head of inquiry.

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(1) 1932 S. C. 498.

(2) [1925] 2 K. B. 438.

(3) [1927] A. C. 834.

With regard to the dependant Mrs. Keane, the mere fact that the employers admit that she was partially dependent upon the deceased man cannot relieve the arbitrator from inquiring into and assessing the amount of compensation upon the lines laid down in *Welsh Navigation Steam Coal Co.* v. *Evans.* (1) In *M'Arthur* v. *Fife Coal Co.* (2) the amount was not in dispute.

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(1) [1925] 2 K. B. 438, 441.
(2) [1925] 2 K. B. 451, 453.
(3) [1925] 2 K. B. 445.
(4) [1927] A. C. 834, 841.

Thomas A. Gentles K.C. and *James R. Marshall* (both of the Scottish Bar) for the respondents. If authority is needed to warrant an arbitrator in applying his judicial knowledge to the solution of questions of the amount of compensation, it will be found in *Silcock & Sons* v. *Golightly* (3) and in *Peart* v. *Bolckow, Vaughan & Co.* (4) Sheriffs and county court judges are appointed as arbitrators for the very reason that they are equipped with knowledge of local conditions.

Upon the main question, it is for the appellants to show that the Sheriff-Substitute has misdirected himself in law. That cannot be made good, because the learned Sheriff-Substitute has followed the direction laid down by Lord Dunedin in *Welsh Navigation Steam Coal Co.* v. *Evans* (5): " You are to find out what such a family budget fitting to the class and position would naturally be." Having done that he has found that neither was the father nor was either of the sisters dependent upon the deceased man for the ordinary necessaries of life. The appellants object that the case of each dependant has not been considered separately, but the objection is without foundation, because the arbitrator has found that 17*s.* a week is sufficient for the provision of the ordinary suitable necessaries of life for persons in the class and position of the claimants, and in fact the father was in receipt of that sum weekly, while each of the daughters was earning more. In the absence of a misdirection in law the finding that 17*s.* a week is sufficient is a finding of fact by the tribunal duly constituted to decide such matters, and so is final and conclusive. If therefore the Sheriff-Substitute had used the method of calculation on which the appellants insist he must have come to the conclusion at which he has arrived. At any rate it is for them to show that he must have reached a result more favourable to them, and they have failed to do this.

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(1) [1927] A. C. 834.
(2) 1927 S. C. (H. L.) 16.
(3) [1915] 1 K. B. 748.
(4) [1925] 1 K. B. 399.
(5) [1927] A. C. 834, 841.

James Walker replied.

The House took time for consideration.

1933. Feb. 27. LORD BUCKMASTER. My Lords, on December 6, 1930, Michael Keane was fatally injured by an accident which admittedly arose out of and in the course of his employment in the respondents' collieries. At the time of his death he was living with, and was the mainstay of his family, consisting of his father, his mother and his two sisters, who are the appellants on this appeal. They claim that they were partially dependent on his contributions "for the provision of the ordinary necessaries of life suitable for persons in his class and position," and are consequently entitled to compensation under s. 4, sub-ss. 1 and 2, of the Workmen's Compensation Act, 1925. This claim has been rejected by the arbitrator and by the Second Division of the Court of Session, though Lord Morison dissented from the judgment.

The facts are these. Michael Keane was at the date of his death a coal-cutter whose average net earnings were 3*l*. 2*s*. 4*d*. a week. His father, Thomas Keane, was receiving unemployment benefit at the rate of 17*s*. a week for himself and 9*s*. for his wife. His two sisters were in employment, receiving a net sum of 21*s*. 8*d*. and 19*s*. 3*d*. respectively weekly. All these moneys were handed over to the mother, Annie Keane, who paid the rent, the household expenses, and provided herself and the other members of the family with clothes and pocket-money. The total sum thus received and spent was 6*l*. 9*s*. 3*d*. and the sum on which the family must now live is 3*l*. 6*s*. 11*d*. No one can doubt the serious extent to which the family life has been impoverished by the death of the chief wage-earner, but that is not the test which the Act of Parliament has established—the standard it lays down is that the impoverishment must be such that the dependants have been deprived of the provision of the ordinary necessaries of life determined according to the words of the statute. The determination of this question is for the arbitrator, and unless he has applied a wrong standard or otherwise misinterpreted the law his decision must be final and cannot be set aside.

Now the arbitrator has found: "(*a*) That for a family of four or five adult persons in the class and position of the claimants a sum of 17*s*. weekly per person, making a total of 4*l*. 5*s*. for a family of five, is sufficient for the provision of ordinary necessaries of life, and in arriving at this conclusion he states: 'I took into consideration the evidence led in the present case, and also my own judicial knowledge of local conditions, and of the average wages of miners employed in this district.'"

In order to get rid of the question that the arbitrator has raised as to the admissibility of such knowledge, I may say that I think that, properly applied, and within reasonable limits, he was entitled to use it. To hold otherwise would involve that a number of witnesses would have to be called in order to bring under judicial notice by legal proof facts within the common knowledge of every one in the district. I see no objection to his having made his judicial experience in this respect available.

The real question in this case is more difficult, and it is that expressed by Lord Morison. The deceased man was a member of a family all living together, and his position was as one of that family, and the real question is whether the sum of 6*l*. 9*s*. 3*d*. a week was more than enough for the provision of the ordinary necessaries of life in a family budget suitable for a person in his class and position: *Welsh Navigation Steam Coal Co.* v. *Evans* (1), and I agree with Lord Morison when he says that the average wage in industry does not necessarily enter into the problem of ascertaining the standard life of a family. If, therefore, I were satisfied that the arbitrator had disregarded this question of the

(1) [1927] A. C. 834.

standard of the family life I should have agreed with Lord Morison that the matter should be returned to him for further consideration. But although he has reduced the matter to an allocated sum per head, yet he shows that he has taken the total sum provided and measured the necessaries of a family in that position in considering that amount.

I do not think his finding that the daughters were not able to go to so many dances or picture-houses, or get so many clothes as formerly, involves the conclusion that reasonable amusement and good clothing were not necessaries for that position of life. Had he done so I should certainly have disagreed with his finding. I think the result he stated might have been better arrived at had he stated that the expenditure during the life of the deceased man was prima facie evidence of the necessities of people in their position, within the meaning of the statute, and then had found to what extent in his opinion the actual circumstances of the case modified this prima facie presumption; but I cannot find in his award sufficient to enable me to say that his definite conclusion of fact is one which there is no evidence to support, or one which is reached by considerations not permitted by the law.

That other people might have reached another conclusion or that I myself might not have been of the same opinion is not sufficient to displace his finding.

This concludes the case with regard to the appellants apart from Mrs. Keane. With regard to her claim, the offer by the respondents of 175*l.* has been reduced to 100*l.*, but I think the same consideration applies. The fact that 175*l.* was offered to her is a matter the arbitrator was bound to consider, and it is clear that he did do so, and though he gives no reason for this reduction, I cannot find he has no ground for his conclusion. The sum offered was very material evidence, but it was no admission, that that was the amount due, and if he in his judgment thought it was too much, unless there was something to invalidate his decision, it must be accepted.

In conclusion, I cannot refrain from making this further remark. This appeal has been made in forma pauperis, and counsel for the appellants has received no fee for his services, but had the appellants been able to obtain by payment the help of the most skilful advocate, they could not have had their case better argued.

LORD BLANESBURGH. My Lords, on December 6, 1930, Michael Keane, a coal-cutting machineman in the service of the respondents, sustained fatal injuries due to an accident arising out of and in the course of his employment. The appellants, his father, his mother, and two sisters, were the only members of the deceased's family within the meaning of these words in the Workmen's Compensation Acts. They claimed to be partially dependent upon his earnings at the time of his death. This appeal arises on a case stated by an arbitrator in a reference in which that claim was made.

In the stated Case the learned arbitrator records a finding that the appellants other than Mrs. Keane (her dependency was matter of admission) were not to any extent dependent on the earnings of the deceased in the statutory sense, and he asks as a first question whether on the facts stated he was entitled so to find. The Second Division of the Court of Session (Lord Anderson and Lord Blackburn; Lord Morison dissenting) have returned an affirmative answer to the question. The appeal seeks to have that answer displaced by one from your Lordships in the negative.

The finding in question was based upon another, set forth in para. 11 of the stated Case, the terms of which are before the House and will be frequently referred to later. Is this finding one fit to be acted upon? It has been utilized by the learned arbitrator in purported obedience to s. 4, sub-s. 2, of the Act of 1925. Is it in conformity with that sub-section, properly construed? These are the main questions, and they involve considerations of wide importance. Before proceeding to consider them I would collect together some relevant facts.

At the time of the deceased's death the appellants were living with him in family together. The family expenditure was regulated by a family purse. The practice of the deceased and his father and his sisters was, as stated in para. 8 of the Case, to hand over each week to Mrs. Keane their net receipts. She paid the rent, defrayed the household expenses, and provided herself and the other members of the family with clothes and pocket-money. Everything received by Mrs. Keane, was spent, the Case finds, "in this way." The total amount received and so expended in every week was 6*l*. 9*s*. 3*d*., made up of 17*s*. unemployment benefit drawn weekly by Thomas Keane; 9*s*. received on the same account by Mrs. Keane as his wife, 21*s*. 8*d*. and 19*s*. 3*d*. earned by the sisters respectively and 3*l*. 2*s*. 4*d*. earned by the deceased.

I pause here to observe that with Lord Morison I should have supposed the above finding in para. 8 to mean no less than that the whole income of this family with nearly half of it earned by the deceased was at his death being expended on the family's "necessaries" properly so called. But there is no finding to that effect. And in para. 9 this is said: "The total weekly sum received by Mrs. Keane before the death of the deceased was 6*l*. 9*s*. 2*d*., and since his death 3*l*. 6*s*. 10*d*. She and the other surviving members of the family are thus worse off than they were while the deceased was alive. Mrs. Keane stated, and I accepted her evidence, that she is not now able to buy the same quality of food as before, and that her daughters are not able to go to so many dances or picture-houses, and do not get so many clothes as formerly."

As to this last sentence I am in doubt whether it is merely a detailed description of the change which since the death of the deceased had taken place in the mode of life of the family—more particularly in that of the two daughters—or whether it is inserted as a qualification upon the character of the family expenditure during the lifetime of the deceased and already described in para. 8. But, whatever was the true intention of the sentence, the learned arbitrator, on the principles enunciated with authority in *Kennedy* v. *Hordern Collieries* (1), with the finding in para. 8 already reached,

(1) [1925] 2 K. B. 438.

and after any further inquiry suggested by the qualification in para. 9—if qualification that be—was at least on his way to all the information he needed to enable him to find, one way or the other, on this question of partial dependency. Why he did not proceed along that way to its end, I do not pause to inquire. I draw attention, however, as I pass, to what I conceive was his duty at this stage, because I shall suggest before I have finished that it is to the discharge of that duty that the learned arbitrator ought now to be recalled.

What he then did, as appears from the stated Case, was to leave paras. 8 and 9 just as they stood, with no further explanation of their meaning either together or separately, and, proceeding at once without preface as to his purpose, he announces in para. 11 the result of what was a new and independent inquiry which he had made. This paragraph, the subject of so much subsequent discussion, is as follows :—

"11. For a family of four or five adult persons of the class and position of the claimants the sum of 17*s.* weekly per person (or a total of 4*l.* 5*s.* in the case of a family of five) is sufficient for the provision of the ordinary suitable necessaries of life.

"In arriving at [that] finding of fact I took into consideration the evidence led in the present case and also my own judicial knowledge of local conditions and of the average wages of miners employed in this district."

Then the stated Case at once concludes : "I found in fact and in law that the claimants other than Mrs. Keane were not to any extent dependent on the deceased for the provision of the ordinary necessaries of life suitable for persons in their class and position and were accordingly not dependants of the deceased within the meaning of the Workmen's Compensation Act, 1925."

Was the learned arbitrator entitled so to find ? That is the first of the questions he propounds.

Now, my Lords, it is not in contest that, with the finding in para. 11 excluded from consideration, there is no warrant shown in the Case for the conclusion reached by him. I propose, therefore, first to consider whether that finding is entitled to any consideration at all. Thereafter I will ask your Lordships to determine what the true resulting position is, if the finding be accepted, as it has been by Lord Anderson and Lord Blackburn and may be again by some or all of your Lordships.

In my judgment, para. 11 ought not to be regarded as a foundation for anything in this case. If I be right in the view I take of it, the paragraph purports to record as a fact something which cannot in law be true; something which in point of law is unascertainable. It embodies a conclusion which could never have been reached had what I deem to be the full connotation of the word "necessaries," as that word is used in s. 4, sub-s. 2, been appreciated. And on that view I believe it to be of vital importance to all persons seeking to establish a status of partial dependency under these Acts that the finding should be shown to be what it really is so that it may have no resurrection in another case.

The root of the matter lies in the true construction of s. 4, sub-s. 2, of the Act. Before I had read the judgments of Lord Anderson and Lord Blackburn in this case it had not occurred to me that the meaning of the sub-section on the vital point now to be discussed was doubtful. There, as I now see, I was mistaken. And as Lord Anderson makes it quite clear that but for his view of the sub-section and of the consequential duty of the arbitrator thereunder no support of para. 11 would have been forthcoming from him, and as the point has become one of wide reaching importance, I proceed at once to consider the sub-section critically. It has a history which casts a light upon its true meaning by disclosing with unusual clearness the source of its provisions and the circumstances attending their appearance in the Act of 1923.

In all the Acts the members of the family of a deceased workman of whom it could be said that he or she was "wholly or in part dependent upon the earnings of the workman at the time of his death" were dependants of his. So far the definition has never varied; and the Court of Appeal

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in *Simmons* v. *White Brothers* (1)—a partial dependency case—accepted as its correct interpretation a statement from p. 156 of Minton-Senhouse and Emery on Accidents to Workmen, in which the following passages occur: "It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. . . . . Each case must stand on its own merits." . . . .

Romer L.J., agreeing with the quotation, expressed its conclusion thus in his own words (2): "I desire to say . . . . that in my judgment a 'dependant,' in order to get compensation, must be dependent in the proper sense of that term, and that it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent on him for the ordinary necessaries of life, having regard to his class and position in life." In passing, I would note the essentially relative touch in each quotation and the statement "Each case must stand on its own merits"—the crux of the present contest, as I see it.

In 1900 the definition came before this House in *Main Colliery Co.* v. *Davies* (3), another partial dependency case. There the Court of Appeal had held, as did your Lordships' House, that the finding of partial dependency by the county court judge could not be disturbed. But, with the exception of Lord Shand, the House showed no favour to the construction placed upon "dependency" in *Simmons* v. *White Brothers.* (1) Lord Halsbury was specially emphatic in an opposite sense. Of the family there, just such a family as we are dealing with in this case, he said (4): "What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard." Again, he said (4): "No human intellect would be able to ascertain exactly what the

(1) [1899] 1 Q. B. 1005.
(2) Ibid. 1008.
(3) [1900] A. C. 358.
(4) Ibid. 362.

standard was if one had to deal with such a question—a standard dependent upon what was the ordinary course of expenditure in the neighbourhood and in the class in which the man lived."

It will be observed that Lord Halsbury's attack in this second citation is upon a "standard" figure—an attack, which, if the true conception of the "necessaries" of an individual being relative to himself be realized—remains to-day, I believe, as overwhelming as it was when he made it. For myself, I need no better evidence of its cogency than the "finding" in para. 11 with which we are in this case concerned.

The Act of 1906—a consolidating and amending Act—followed without qualifying Lord Halsbury's views as expressed in either citation. The qualification—and with reference to the first citation only—came in s. 22 of the Act of 1923, now reproduced in the present s. 4, sub-s. 2, of the Act of 1925. I transcribe the sub-section again for convenience of reference.

"A person shall not be deemed to be a partial dependant of another person unless he is dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

The result, as was said by Warrington L.J. in *Peart* v. *Bolckow, Vaughan & Co.* (1), is that since 1923 there was thus enacted for the future the construction of the definition of "dependants" adopted in *Simmons* v. *White* (2)—a statement in singular contrast, as I think, with the construction now placed upon the sub-section by Lord Anderson, but a statement which, so far as partial dependants are concerned is, as it seems to me, completely adequate.

Now, it has since been asked from time to time whether the statutory condition thus attached to partial dependency imposes upon an arbitrator in a contested case the impossible duty described by Lord Halsbury in the second citation from his speech in *Main Colliery Co.* v. *Davies.* (3) The best answer to the question is, I think, that given by Lord Dunedin in similar circumstances in *Welsh Navigation Steam Coal Co.* v. *Evans* (1), where he says that it is not now a question of what Lord Halsbury did or did not then say; the question is what s. 4, sub-s. 2, of the Act means. And the whole matter has been elaborated by Judge Moore in *Kennedy* v. *Hordern Collieries* (2), in a judgment approved in terms by the Court on Appeal and by this House, with a slight modification not now material, in *Welsh Navigation Steam Coal Co.* v. *Evans.* (3) I think his Honour's view thus approved may be summed up in the words "solvitur ambulando." For it is the fact, the significance of which is compelling, that, if to his duty as laid down in Lord Halsbury's first citation there be added the qualification, as regards partial dependants, now required by the sub-section, the resulting task imposed upon an arbitrator in this matter is in no way different from that imposed upon every tribunal charged with the duty of determining what things are "necessaries" and what things are not. And you will search the multitudinous authorities on that subject, without, so far as I have been able to find, the slightest indication that any such inquiry has been either called for or attempted in any of them. And in this Scottish case I may perhaps be permitted to say that it has been to me a great aid to the construction of s. 4, sub-s. 2, to have in mind the fact that the word "necessaries" is, in English law, a term of art, with a well defined signification. The reference to "necessaries" in s. 4, sub-s. 2, it will not, I suppose, be questioned, in view of its source, is a reference to the English use of the term, and it points to the duty by that use, laid in everyday practice, upon a judge, or a judge and jury in, for example, an action for "necessaries" supplied to an infant or other incompetent person, where in terms of the Sale of Goods Act, s. 2, "necessaries" "means goods suitable to the condition of life of the infant or other incompetent person and to his actual requirements at the time of delivery";

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(1) [1925] 1 K. B. 399, 412. (2) [1899] 1 Q. B. 1005.
(3) [1900] A. C. 362.

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(1) [1927] A. C. 834, 838.

(2) [1925] 2 K. B. 438.

(3) [1927] A. C. 834.

or again in actions for the price of "necessaries" supplied by the plaintiff to, for instance, the wife or infant son of the defendant. In such cases, as is pointed out by Parke B. in *Peters* v. *Fleming* (1): "It is perfectly clear, that from the earliest time down to the present, the word 'necessaries' was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain *the particular person* in the state, station, and degree of life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense."

These references—they might be indefinitely multiplied—lead, I assert with confidence, to the clear conclusion that the words of the sub-section "the ordinary necessaries of life suitable for persons in his class and position" are, as they were in the text-book from which they come, no more than the ordinary qualification of the word expressed in terms comprehensive enough to cover the case of any "member of the family," according to his class and position, of any deceased "workman" whose death has resulted from an accident arising out of and in the course of his employment. With the English use of the word in my mind it would never have occurred to me that behind these words of mere ordinary qualification a particular "standard" for each claimant ascertained by a procedure quite sui generis was being set up.

But there is another qualification of the word, equally invariable, and well suggested by the use in the sub-section of the singular number. There must always be considered Parke B.'s "particular person." "Necessaries" are always relative. "Each case must stand on its own merits." "Necessaries" must not only be suitable for one of the class and position of the recipient but they must be such as are required by the recipient himself according to his actual need at the time. Even in the case of individuals of the same class and position a permissible scale of expenditure for "necessaries" varies from family to family; from individual to individual; from one individual at one time to the same individual at another. The scale depends upon considerations of age, sex, health, occupation and the like, personal to the particular recipient. Boots may be the special need of one; blankets of another. "Articles of mere luxury," says Alderson B., "are always excluded, though luxurious articles of utility are in some cases allowed": *Chapple* v. *Cooper*. (1)

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(1) (1840) 6 M. & W. 42, 46.

In other words, the precise content of the expression is dependent upon the special circumstances of the particular case, and it is, I believe, true to say that the notion of "necessaries" apart from the needs of the particular recipient is a conception entirely foreign to the English law. Until the present case, no one, so far as I know, has put forward the suggestion that it finds any place in s. 4, sub-s. 2, and with reference to that sub-section the very idea is negatived by *Kennedy* v. *Hordern Collieries, Ld.* (2), and by Lord Dunedin in *Welsh Navigation Steam Coal Co.* v. *Evans* (3), in a judgment quoted by both Lord Anderson and Lord Morison. It is not to be doubted that there Lord Dunedin's "family budget," the prima facie measure of family "necessaries," was a budget of the family in question appropriate to the needs and circumstances of each of its members and regulated in its final amount by those needs and circumstances.

All of which is borne out by the form of the sub-section itself. There you find just such language as you would expect, if the two vital qualifications attached to the word on which I have been insisting are there again being respected. The "necessaries" towards the provision of which there must have been contribution must "be suitable for persons in [the] class and position" of the claimant; and it is as "necessaries" for him that they have been provided.

Before leaving the consideration of this word "necessaries" as used in the sub-section I would draw attention to a passage in Lord Anderson's judgment where, when discussing the sufficiency of the arbitrator's 17*s.* a week in the case of the father whose sole income was unemployment benefit of that amount, he says: "The case of the father is even more clear, because the purpose of a grant from the unemployment fund is to put the recipient in a position to obtain the necessaries of life and obviate any claim against the Poor Law Authorities." Unemployment benefit—a flat rate fixed irrespective of the amount earned by the insured person during employment—a payment merely sufficient to obviate any claim against the Poor Law Authorities—to be a standard measure of partial dependence, is a proposition from which I recoil. An interpretation, however, has been placed upon the word as used in the section in a judgment which, as I have already said, has received the approval both by the Court of Appeal and this House, and it suffices. "The only safe course," says Judge Moore, "is to give to the word 'necessaries' the same meaning as has been attached to the word in other connections, as for instance in connection with contracts by infants. Accordingly, I understand the word 'necessaries' as including all such things as are necessary 'to maintain' the particular person 'in his state, station and degree.'" (1)

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(1) (1844) 13 M. & W. 252, 258.

(2) [1925] 2 K. B. 438.

(3) [1927] A. C. 834, 841.

In the light of these observations upon the true effect of the sub-section I proceed to examine the finding in para. 11 of the stated Case. What are the so-called "necessaries" with which the paragraph is dealing? Have they any title whatever to the name? At the outset I would point out that this is no question of fact. It is a question of law—the investigation being undertaken in order to ascertain whether the "necessaries" evaluated can, in law, be any measure of those "necessaries" referred to in the sub-section for the provision of which the appellants were, as they say, partially dependent on the deceased. The whole jurisprudence on this subject will be found in the judgment of Willes J. in the leading case of *Ryder* v. *Wombwell* (2), a judgment which justifies fully, I think, the statement I have just made. In this connection some further circumstances in relation to

(1) [1925] 2 K. B. 443.

(2) (1868) L. R. 4 Ex. 32.

this family and to the finding in para. 11 need to be stated.

Reference has been made to the unemployment benefit of which Thomas Keane and Mrs. Keane were in receipt—their only source of income. In fact, at the death of the deceased, the father, like the son a coal-cutting machineman, had owing to serious illness been unemployed for two years. The father thirteen months after his son's death was 54; Mrs. Keane 51, and the two sisters 23 and 18 respectively. It will thus be seen that during the lifetime of the deceased this family of five, for whom "necessaries" had to be provided, comprised within the limit of its numbers almost every variety of age, sex, health, weakness, strength and activity. Who then are the persons for whom in para. 11 it is found that 17*s*. each is a sufficient weekly provision for "necessaries"? The paragraph is as remarkable for those it excludes as for those it includes. It contains no finding of the standard appropriate to an individual member of families of six or over; no finding as to the presumably larger sum appropriate to an individual member of small families of three or of two; not, most striking of all, to a member of a family living alone. To be included the persons specified must be of the class and position of the appellants; they must be adult; and members of a family of four or of five living together. But for each of these the sum required is an unvarying sum, neither maximum nor minimum, not even average. It is rigid, robot-like in its uniformity. This is at once its outstanding feature and its condemnation. The finding applies to each person included irrespective of any circumstances affecting him or her.

Now, my Lords, as may have been gathered, my objection to this finding is not that it is based to some extent on the learned arbitrator's judicial knowledge of local conditions, knowledge which in this case may have helped him with reference to each of the claimants, for all of them, as it chanced, were resident within his own district: that knowledge, I feel sure, he was entitled to use; nor am I sceptical for the reason that the rigidity of the figure is unbroken, notwithstanding the fact that wages in the district are not uniform and that an average has been taken; nor for the reason that, if the evidence to which the learned arbitrator refers is that resulting in paras. 8 and 9 of the Case, it would appear to contradict rather than to support the finding; nor even for the reason that the finding is uniform—as it happens, fortunately so—for families of four and of five; but is not applicable to families either of six or of three persons. All these things may justify criticism, more or less trenchant, of the finding itself. But all that is a matter for the learned arbitrator and not for your Lordships. The legitimate judicial criticism of the finding runs on different lines and is that even infinite knowledge would not have enabled the learned arbitrator to reach it, for the finding as expressed is a contradiction in terms. It is an attempt to find a sum for "necessaries" in vacuo, with no reference to Parke B.'s "particular person" in his individual or special needs or otherwise. It is a solution reached by ignoring the existence of essential constituent factors of the problem, factors none the less essential although ex natura rerum they are incapable of quantification. It may be too much to say that the so-called "necessaries" evaluated in the result are little better than would be the play of Hamlet without the Prince of Denmark. But it is, I think, clear and this is enough, that the learned arbitrator, in reaching his conclusion, has misdirected himself in an essential respect, so that the result, whether as a standard or otherwise, is valueless and his award based on it is left without support. And Lord Anderson, as I read his judgment, would have thought little more than I do of the finding in para. 11 had he taken my view of s. 4, sub-s. 2. His acceptance of the paragraph was due to the construction placed by him on the sub-section which is thus expressed in his judgment: The "enactment does not make the standard the actual expenditure by the claimant, but such expenditure as is requisite for the provision of the ordinary necessaries of life suitable for persons in his class and position." In his view and in that of Lord Blackburn the learned arbitrator's only course on that construction of the sub-section was to make the inquiry described in para. 11 and then act upon it. Therein he merely did what he was required to do, Lord Halsbury non obstante. And in the future, apparently, some such inquiry, it may be many such inquiries in a single reference, will be a characteristic feature of such cases, a prospect which in the interests of claimants whose "necessaries" are above the normal by reason of age, ill-health or other disability I view with alarm. My Lords, I have already in anticipation given the answer, as I see it, to these views, which are, in my judgment, fundamentally mistaken. I would add no force to that answer by repeating it.

As I have said, it is not in dispute that if para. 11 of the stated Case goes, everything goes. It follows, therefore, that in my judgment the answer of your Lordships to the learned arbitrator's first question should be in the negative.

But, my Lords, the finding in para. 11 may be accepted by your Lordships. I ask you therefore to consider now what, on that footing, should be the result of the appeal. It will have been noticed that in his stated Case the learned arbitrator does not even hint at the process of reasoning by which taking from para. 11 his figure of 17*s.* a week he was able to find "in fact and in law" that the appellants other than Mrs. Keane were not to any extent dependent upon the deceased. That process of reasoning the Court is left to find out for itself, and it seems from Lord Anderson's judgment that he felt somewhat embarrassed by this omission from the Case. It is, however, I think, hardly open to doubt how the learned arbitrator reasoned. Take the case of the father: 17*s.* a week is all that is required for his "necessaries," and he was in receipt of 17*s.* extended benefit. True it was only extended benefit, but it was being paid at the death of the deceased. The father accordingly was not dependent upon his son to any extent. And so, also as to each of the sisters, with their 21*s.* 8*d.* and 19*s.* 3*d.* a week respectively. Now, my Lords, if such was his reasoning, it was, I suggest, quite fallacious. If these weekly receipts were being regarded as the receipts of the appellants living separately then, as has been seen, there was no finding as to the sum required for their "necessaries" in that state. If, however, these payments are still being regarded as payments to a family purse, then with the standard 17*s.* ascertained the question is surely nothing but this: was there at the death of the deceased with his contribution withdrawn as much as 17*s.* a week left in the family purse for each of the appellants, and the answer, as I shall show in a moment, is that there was not. Indeed, I suggest that so soon as 17*s.* a week is accepted as standard and so soon as the governing influence of a family purse on the constitution or otherwise of partial dependence is realized, the conclusion is inevitable that each of the appellants was dependent on the deceased and not Mrs. Keane only. Mrs. Keane had the personal advantage of an admission in her favour, and the injury sustained by her through the death of her son may have been far greater than that sustained by, e.g., either of her daughters. But on this issue of the existence of partial dependency—an entirely separate thing, there was, I suggest, no distinction at all between her position and that of the others.

Here we have a family purse with no complications, one into which the entire family income, at the time of the accident to the deceased, was being paid. The purse so established and administered by Mrs. Keane meant that there was not then for any member of the family any other source from which the requisite "necessaries" could be supplied, it being an incident of a "family purse," as pointed out by Warrington L.J. in *Peart* v. *Bolckow, Vaughan & Co.* (1), that the necessaries in such a case are the necessaries of life for the family as a whole.

So much established, the rest is, I suggest, clear. I give what appear to be the correct figures as they appear in the Case. With a sum of 3*l.* 8*s.* ascertained by para. 11 to be the sum sufficient to provide necessaries for the surviving members of this family living together, all that on this issue of dependency remained to be ascertained was whether a purse which in the deceased's lifetime and as a result of his contributions had every week amounted to a sum far in excess of the 17*s*. required for each member of the family, including himself, would now following his death reach a sum of as much as 3*l*. 8*s*.—a simpler inquiry on the same lines as that already indicated as proper at the stage when the actual sum required for family necessaries had still to be ascertained. And the certain answer was that the purse after the deceased's death would amount to 3*l*. 6*s*. 11*d*. and no more, showing a deficiency for necessaries of 1*s*. 1*d*. a week. To that extent at all events—however much more they might have lost by his death—the appellants, all the appellants, and all of them equally, were dependent upon the earnings of the deceased. A small sum, it will be said, and truly. But note that the existence or otherwise of the status of partial dependency in no way turns upon any question of amount. The injury sustained by any partially dependent member of the deceased's family as a result of his death will be an entirely different question resting upon further and much wider considerations. But in determining merely the fact of dependency—the issue with which the House is alone here concerned—the sole question, as was laid down once for all by Lord Halsbury in *Main Colliery* v. *Davies* (1), is whether there was any dependency at all giving a right to anything, a position recognized by the learned arbitrator himself in his finding that the question before him was whether the appellants were *to any extent* dependent on the deceased.

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(1) [1925] 1 K. B. 399, 413.

Upon this question, accordingly, I suggest to your Lordships that even on the footing that para. 11 is accepted, the appellants are still entitled to have the first question of the learned arbitrator answered in the negative. I prefer, however, to justify that answer on the broader ground first stated.

My Lords, had I been of opinion that the first question should be answered in the affirmative, I should not have thought that the second question with reference to the award of 100*l*. to Mrs. Keane was serious enough for your

(1) [1900] A. C. 358, 361.

Lordships' consideration. But it is, as I understand, the learned arbitrator's own wish if his award, in other respects, is set aside that the whole matter, including the award to Mrs. Keane, should be referred to him for reconsideration. This, I think, is really necessary. Accordingly, if my judgment on the main issue answering the first question in the negative were to have effect, I would remit to the learned arbitrator the whole of his award for reconsideration with a direction to complete his investigation so far as the results under paras. 8 and 9 are still incomplete, and with a further direction to exclude from his reconsideration every reference to para. 11.

LORD WARRINGTON OF CLYFFE (read by LORD MACMILLAN). My Lords, this is an appeal from an Interlocutor dated March 9, 1932, of the Second Division of the Court of Session whereby by a majority (Lord Anderson and Lord Blackburn; Lord Morison dissenting) the Court affirmed an award of the Sheriff-Substitute, the arbitrator under the Workmen's Compensation Act, stated in the form of a Special Case.

The appeal raises two questions:—

(1.) Whether the arbitrator was right in law in the conclusion at which he arrived that the appellants other than Annie Handley or Keane (the mother of the deceased workman) were not partially dependent on contributions from the deceased workman for the provision of the ordinary necessaries of life suitable for persons in their class and position, and were therefore not to be deemed to be partial dependants of the workman under s. 4 of the Workmen's Compensation Act, 1925.

(2.) Whether the arbitrator was correct in awarding 100*l.* as compensation to the said Annie Handley or Keane, as to whom the respondents had admitted that she was a partial dependant.

My Lords, as to the second question, I fail to see any ground for interfering with the arbitrator's award. The fact of partial dependency being admitted, it was his duty to determine what sum as compensation was reasonable and proportionate to the injury to the particular dependant. This was a question entirely for him. I cannot find that in fixing the sum of 100*l.* he has proceeded on any footing wrong in law, and in my opinion his award has been properly affirmed by the Court of Session.

The determination of the first question is not so easy, but for the reasons I am about to give I have come to the conclusion that in this case also the award of the arbitrator cannot be interfered with.

The question arises under s. 4, sub-ss. 1 and 2, of the Workmen's Compensation Act, 1925. There is, I think, no real difficulty in the construction of that section. Under sub-s. 1 the appellants, Thomas Keane, the father, and Catherine Keane and Hannah Keane, sisters of the deceased workman, were members of his family, and therefore entitled to claim compensation if they respectively were wholly or in part dependent upon the earnings of the workman at the time of his death. But by sub-s. 2 it is provided as follows: "A person shall not be deemed to be a partial dependant upon another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position."

The arbitrator accordingly before he can award compensation to a person as a partial dependant must come affirmatively to the conclusion that he was at the time of the workman's death dependent partially on contributions from him for the ordinary necessaries of life as defined in the sub-section. This is a question of fact, and unless it can be shown either that there was no evidence to support the arbitrator's finding, or that he has in some way misdirected himself in point of law, his decision cannot be interfered with in a Court of Appeal.

The material facts as stated by the arbitrator in the special case are as follows: The deceased workman was a miner in the employ of the respondents, and on December 6, 1930, he received an injury by accident arising out of and in the course of his employment as the result of which he died.

At the time of his death he and his father, his mother, and his two sisters were living in family together.

At the time of the death the father, Thomas Keane, was in receipt of 26*s.* per week unemployment benefit (17*s.* for himself and 9*s.* for his wife). The deceased workman was receiving wages amounting on the average to 3*l.* 2*s.* 4*d.* per week. The sisters Margaret and Hannah were earning 21*s.* 8*d.* and 19*s.* 3*d.* respectively per week. The mother was receiving nothing. The total of these receipts was 6*l.* 9*s.* 3*d.* per week.

The whole of this sum was handed over to the mother each week and she "paid the rent, defrayed the household expenses, and provided herself and the other members of the family with clothes and pocket-money. All the money received by Mrs. Keane from week to week was spent in this way—nothing was saved."

By the death of the deceased the weekly income of the family was reduced to 3*l.* 6*s.* 11*d.* In the arbitrator's words: "Mrs. Keane stated, and I accepted her evidence, that she is not now able to buy the same quality of food as before, and that her daughters are not able to go to so many dances or picture-houses, and do not get so many clothes as formerly." (Case stated, para. 9.)

The arbitrator then states his findings as follows: "(11.) For a family of four or five adult persons in the class and position of the claimants the sum of 17*s.* weekly per person (or a total of 4*l.* 5*s.* in the case of a family of five) is sufficient for the provision of the ordinary suitable necessaries of life.

"In arriving at the last finding of fact (No. 11) I took into consideration the evidence led in the present case and also my own judicial knowledge of local conditions and of the average wages of miners employed in this district.

"I found in fact and in law that the claimants other than Mrs. Keane were not to any extent dependent on the deceased for the provision of the ordinary necessaries of life suitable for persons in their class and position and were accordingly not dependants of the deceased within the meaning of the

Workmen's Compensation Act, 1925." The finding that such persons were not dependent must of course mean at the time of the workman's death, this being the material time.

If the finding of fact in the last paragraph is correct, then the finding in law necessarily follows, inasmuch as the condition of partial dependency imposed by sub-s. 2 has not been satisfied. The question then is, are there any grounds on which the finding of fact can be challenged ? In my opinion there are none. As regards evidence, we are not informed what evidence was led except the statement of Mrs. Keane in para. 9. She does not suggest that the family are reduced to anything like deprivation of actual necessaries, and I should rather infer from this statement and that in para. 8 that during her son's lifetime the family were living in a condition exceeding in comfort the provision of bare suitable necessaries. It is in my mind impossible to say there was no evidence sufficient to support the arbitrator's finding.

Then has he in any way misdirected himself ? I cannot think so. His finding was attacked because he took into account his judicial knowledge of local conditions. But there is a series of decisions that an arbitrator in such cases is entitled if indeed he is not required to do as this arbitrator has done. It is only necessary to refer to the judgment of Fletcher Moulton L.J. in *Roberts & Ruthven* v. *Hall* (1) and of Scrutton L.J. in *Peart* v. *Bolckow, Vaughan & Co.* (2) I have never heard this principle questioned, and I entirely agree with Fletcher Moulton L.J. and Scrutton L.J. that to require, as a matter of principle, evidence in such cases and to exclude the judge's knowledge and experience would be a positive misfortune as tending to increase expense and delay. After all, to quote Lord Dunedin in *Welsh Navigation Steam Coal Co.* v. *Evans* (3) : "You are to take the necessaries of life. The expression is a common well understood expression. It indicates food, clothing and shelter and the necessary concomitants thereto." To ascertain what are the necessaries suitable to persons in a particular class or position no one surely is better qualified than county court judges in England or Sheriffs in Scotland, who in the course of their judicial duties are constantly in contact with persons of the working classes and their ways of life, and in a position to form an opinion on such a subject as that in question.

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(1) (1912) 5 B. W. C. C. 331, 333. (2) [1925] 1 K. B. 399, 419.
(3) [1927] A. C. 834, 841.

The result is that in my opinion the arbitrator has acted correctly in point of law and that his finding in fact cannot be disturbed.

The appeal therefore should in my opinion be dismissed.

Lord Russell of Killowen. My Lords, I am unable to discover any grounds which would justify us in holding either that the arbitrator had not acted in accordance with the provisions of the Act of Parliament, or that in so acting he had reached a conclusion which he should not have reached.

The main ground upon which the procedure of the arbitrator was challenged was that he was not entitled to introduce a hypothetical standard, as he had done in his finding No. 11. In my opinion that is exactly what s. 4 of the Act requires him to do. The function of s. 4 is to tell us who are the dependants to whom or for whose benefit the compensation is (as provided by s. 2) payable where death results from the injury to the workman. Omitting the case of the illegitimate child and dealing with the case where the injury results in immediate death, dependants are declared by s. 4, sub-s. 1, to be such of the persons specified in s. 4, sub-s. 3, as were at the time of the workman's death wholly or in part dependent upon his earnings. But the persons who were only in part so dependent are not all of them necessarily dependants entitled to claim compensation under the Act, because s. 4, sub-s. 2, provides that a person shall not be deemed to be a partial dependant of another person unless he was dependent on contributions from that other person for "the provision of the ordinary necessaries of life suitable for persons in his class and position."

As I read s. 4, sub-s. 2, its meaning and effect is that before the father of Michael Keane or either of the sisters of Michael Keane can be entitled to claim compensation as a dependant of Michael Keane under the Act, it must be established as a fact that he or she was at the death of Michael Keane dependent partially on contributions from him for the provision of the ordinary necessaries of life judged according to a standard—namely, what is suitable for persons in the class and position of the claimant. Whether a particular person was so dependent is a question of fact for the arbitrator to decide upon proper evidence; and unless the arbitrator has acted upon inadmissible evidence or has acted contrary to the provisions of the Act of Parliament, we have no power to interfere. Nor ought we to have any desire to interfere, for we have none of the evidence before us.

Let me take the specific case of one of the sisters, and consider how the arbitrator has dealt with her claim and whether in so doing he has followed the provisions of the Act of Parliament. I will take Catherine.

She was one of the persons named in s. 4, sub-s. 3, and she was in part dependent upon the earnings of Michael Keane at the time of his death. So much is not in dispute. But the arbitrator had to ascertain something further about her —namely, was she at the time of the death of Michael dependent partially for the ordinary necessaries of life suitable for persons in her class and position on contributions from him? The answer to that question involves the ascertainment of two facts. The first is what sum would be required at the death of Michael for the provision of the ordinary necessaries of life suitable for a person in the class and position of Catherine. In order to ascertain this fact the arbitrator has considered the evidence given before him, has utilized his own judicial knowledge of local conditions and average wages in the district, and has fixed the sum so required for a person in the class and position of Catherine and one of a joint household (as Catherine was) of four or five persons, at 17*s*. a week.

The second fact involved is, had Catherine at the time of the death means of her own equal to or exceeding that sum? That fact is established by the finding that her net wages were 21*s.* 8*d.* a week. As a result of those facts he finds that Catherine was not to any extent dependent on contributions from Michael for the provision of the ordinary necessaries of life suitable for persons in the class and position of Catherine. He has arrived at the same result in the same way in regard to the father and the other sister.

My Lords, how can we say that the arbitrator has erred? So far as the provisions of the Act of Parliament are concerned, he has in my opinion followed them. So far as his findings of fact are concerned, they appear to me to be based on proper evidence. What the exact nature of that evidence was we do not know. It is not before us; but it was seemingly of such a nature as to force the arbitrator with reluctance to exclude the father and sisters from any claim to compensation. I can find no materials in the present case which could enable your Lordships to say that the arbitrator's finding that the father and sisters were not dependents of the deceased within the meaning of the Act was wrong either in fact or in law. I am accordingly of opinion that the questions of law Nos. 1 and 3 were rightly answered in the affirmative.

As regards the question of law No. 2, I have throughout felt some difficulty in understanding its exact purport; but as I read the admission in question, it extends no further than to concede that Mrs. Keane was a partial dependant who fulfilled the requirements of s. 4, sub-s. 2. There is no admission as to the amount of compensation to which she is entitled, and for the purpose of ascertaining this recourse must be made to s. 8, sub-s. 2 (iv.), under which the amount will be such sum (with a limit) as may be determined to be "reasonable and proportionate to the injury" to Mrs. Keane. There is nothing in the admission which "exonerates" or prevents the arbitrator from making any inquiries necessary or proper for arriving at that determination.

In my opinion the appeal wholly fails and should be dismissed..

H. L. (Sc.)
1933
KEANE
v.
MOUNT
VERNON
COLLIERY
Co.

LORD MACMILLAN. My Lords, I concur in the motion which has been proposed by the noble and learned Lord on the Woolsack. I cannot see that the arbitrator has in any way misdirected himself in law in his approach to the problem which in this case the statute presented to him; nor can it be said that he had not evidence before him on which he could find as he did, or that he improperly availed himself of his judicial knowledge of local conditions.

Interlocutor appealed from affirmed, and appeal dismissed.

Lords' Journals, February 27, 1933.

Agents for appellants: *Findlay, M'Clure & Co., for R. Maguire, Cook & Co., Glasgow, and Allan M'Dougall & Co., S.S.C., Edinburgh.*

Agents for respondents: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1933
Feb. 3.

SHAIK SAHIED BIN ABDULLAH BAJERAI . . . . APPELLANT;

AND

SOCKALINGAM CHETTIAR . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, STRAITS SETTLEMENTS.

Straits Settlements—Application of English Law—" With respect to mercantile law"—Money-lender—Suit on Promissory Note—Absence of Memorandum of Contract—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6 *—Ordinance No.* 111 (*Civil Law*), *s.* 5, *sub-s.* 1 (*Revd. Laws,* 1926).

A money-lender carrying on business in the Straits Settlements sued there on a promissory note and post-dated cheque given in respect of a loan. The defendant pleaded that the suit could not be maintained, as there was no note or memorandum in writing of the contract in accordance with s. 6 of the (English) Moneylenders Act, 1927; he contended that that section applied by virtue of s. 5, sub-s. 1, of Ordinance No. 111 (Civil Law) of the Colony.

Held, that the defence failed, because no question arose in the suit " with respect to mercantile law " so as to make English law apply under the terms of the Ordinance.

Seng Djit Hin v. *Nagurdas Purshotumdas & Co.* [1923] A. C. 444 considered.

Judgment of the Court of Appeal, Straits Settlements, affirmed.

APPEAL (No. 57 of 1932) from a judgment of the Court of Appeal, Straits Settlements (Singapore), dated November 30, 1931, affirming a judgment of Sproule A.C.J.

The respondent, who carried on business in the Straits Settlements as a money-lender, sued the appellant in the Supreme Court claiming to recover on a promissory note and post-dated cheque given in respect of a loan. Among other defences the appellant relied on the absence of a note or memorandum in writing of the contract in accordance with s. 6 of the (English) Moneylenders Act, 1927.

The question for determination in the appeal was whether the above section was made applicable in the Straits Settlements by s. 5, sub-s. 1, of the Civil Law Ordinance, now

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Ordinance 111 of the Revised Laws of the Straits Settlements, 1926. The terms of that provision appear in the judgment of the Judicial Committee.

The trial judge (Sproule A.C.J.) made a decree for the principal and interest claimed. He held that the question at issue was " with respect to mercantile law " within the meaning of s. 5, sub-s. 1, but that the circumstances did not allow the application of the English Moneylenders Acts, as they created machinery and procedure which made them wholly inapplicable in the Straits Settlements. The judgment was affirmed on appeal by Murison C.J., Thorne and Terrell JJ. substantially on the above ground.

1933. Jan. 12, 13. *Pritt K.C.* and *James Wylie* for the appellant.

Sir Stafford Cripps K.C. and *H. C. Marks* for the respondent.

Feb. 3. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of the Straits Settlements, where the Court of Appeal dismissed an appeal from the Acting Chief Justice, who gave judgment for the plaintiff.

The action was brought by the plaintiff, a professional money-lender, against the defendant, a landowner, upon a promissory note payable on demand and a post-dated cheque given in respect of money-lending transactions. The only defence material to this appeal is that there was no memorandum in writing of the contract signed by the borrower in pursuance of s. 6 of the (English) Moneylenders Act, 1927. The question is whether the provisions of s. 6 apply to this transaction in Singapore. The suggestion is that the section is made applicable by s. 5, sub-s. 1, of Ordinance No. 111 (Civil Law) of the Straits Settlements. That sub-section provides : " In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law

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generally, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question in issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute." The argument is that the question in this case is whether the defendant is liable on a negotiable instrument, that such question is one "with respect to" mercantile law, which includes the law of negotiable instruments, and that in applying English law to such a case in England the Courts would have had to apply the Moneylenders Act.

The Courts in Singapore have rejected that contention, and their Lordships agree with this decision, but for reasons which do not altogether conform to those given in the Colony.

It is to be noted that the section does not purport to apply in every mercantile transaction. It applies only where a question or issue has to be determined with respect to mercantile law. The general object, no doubt, is to secure uniformity of mercantile law in Singapore and the United Kingdom, though, of course, whatever the object, full effect must be given to the plain meaning of the words used. It is obvious that there are mercantile transactions in which no question with respect to mercantile law arises; just as there are non-mercantile transactions in which such a question does arise. On a claim arising out of a sale of goods, the only question may be whether the plaintiff ever entered into an alleged written contract. If the sole question is whether his signature is a forgery, no question as to mercantile law seems to arise; if it is said he had given express or implied authority to some one to bind him, a question "with respect to" the law of principal and agent or mercantile law generally may well arise. Similarly, an allegation that an assent to a mercantile contract was obtained by duress, or by fraud, would normally not be a question with respect to mercantile law. So if a question of insurable interest arose on a claim on a fire policy, the law as to what constituted an insurable interest would be determined by the law of England; but the application of the principles in Singapore might depend upon the law of landlord and tenant, bills of sale, or the administration of deceased persons' estates, none of which in themselves form part of the mercantile law. It might, on the other hand, depend upon questions relating to the law of contracts of sale or contracts of carriage by sea or land, which would bring into application the statute. Similarly, in an ordinary action of fraud, or in a criminal prosecution, in neither case arising out of a mercantile transaction, questions of property might arise which could only be determined by recourse to mercantile law.

Now it seems beyond dispute that the English Moneylenders Acts, 1900 to 1927, form no part of the mercantile law. They contain saving clauses which make it plain that borrowing of money in the course of ordinary commercial transactions is excluded from their scope. If such a case as this arose in England between a professional money-lender and a landowner it would not, their Lordships think, occur to any one that an issue raised under any of the sections of the Moneylenders Acts related to mercantile law. Indeed, it seemed to be admitted in argument that such a question only arose where the suit was on a negotiable instrument. So that if the money-lender took a mortgage with a covenant or took a promissory note, the same defence that he was unregistered would arise "with respect to mercantile law" in the second case but not in the former. The contention is untenable.

On this point the learned judges, with respect, have followed too closely the decision of this Board in *Seng Djit Hin* v. *Nagurdas Purshotumdas & Co.* (1) In that case the claim arose on a contract for the sale of goods, and the question to be decided was whether the seller of goods c.i.f. was excused from delivery because his goods had been requisitioned by the Government. He pleaded the provisions of the Defence of the Realm regulations. The Board decided that such a question arose with respect to mercantile law. Temporarily they formed part of the provisions of the law

(1) [1923] A. C. 444.

relating to the sale of goods, clearly a branch of mercantile law. Their Lordships find nothing in the case which appears inconsistent with what has been said above. The defendant's plea therefore fails in limine on the ground that no question had to be decided with respect to mercantile law.

But their Lordships think it desirable to add a few words as to the reason which prevailed with all the learned judges below, that in any event the Moneylenders Acts were not such legislation as it was ever contemplated should be extended by the Ordinance to the Colony. As the Acting Chief Justice said: "They are a very special municipal series of legislative provisions creating procedure and machinery and setting up restrictions and sanctions which are quite impossible of application in our case." No doubt all legislation is in one sense municipal; but for the purposes of the Ordinance there seems to be a clear distinction between legislation which has the effect of modifying the general principles of any branch of mercantile law and legislation which is intended to regulate the exercise in England only of particular activities by providing for registration, licences, procedure, and penalties which can only be carried into effect in England itself. Such law is not capable of extension to the Colony, and in their Lordships' opinion for that reason is not covered by the Ordinance. It is unnecessary to rehearse the various provisions in the Moneylenders Acts which indicate that the Acts are intended solely for the English regulation of the activities of money-lenders in England, and would be unsuitable and impossible of performance in the East. In no event could they be included in the law to be administered in pursuance of the Ordinance.

Counsel for the appellant preferred to meet this construction of the statute on narrower ground. The Acts, he said, are to be applied in Singapore; but lex non cogit ad impossibilia, and if some of the provisions are found there to be impossible of performance, e.g., registration, then there will be no duty to obey them. But such parts as are possible, as the provisions in s. 6, are incorporated into the law of Singapore. The whole Act is shipped to Singapore,

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but parts cannot be landed and are dumped in the harbour; the rest is imported. Their Lordships cannot accept this contention. The Act must be judged as a whole, and if it is found to be restricted to regulation of activities in England and not to be capable of general application, it is not within the scope of the Ordinance at all. To take one or two sections of such an Act, divorced from their context, is to apply a new law, which is not the law of England, and so abstracted might never have been introduced into England at all.

The learned judges, in arriving at their conclusions on this point, appear to have fortified their opinion by reference to the words used by Lord Dunedin in giving the judgment of the Board in the case above cited, that the Defence of the Realm Act and the Courts Emergency Powers Act could be pleaded if the facts allowed of their application. In that case the attention of the Judicial Committee was not directed to the question raised here, which did not arise. The words used only mean if the facts in the particular case make the particular provision applicable; in that case if the performance was in fact prevented by requisition. In the present case, therefore, their Lordships are unable to rely upon a previous decision of their own in support of the view that they have expressed. But, though unfortified by authority, they entertain no doubt that the result is as stated.

They will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *Tamplin, Joseph, Ponsonby, Ryde & Flux.*

Solicitors for respondent: *Speechly, Mumford & Craig.*

[PRIVY COUNCIL.]

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JOHN GILBERT SUTTON . . . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Cyprus—Criminal Law—Hearsay Evidence—Statement by Injured Person—Construction of Local Enactment—Criminal Evidence and Procedure Law, No. 12 *of* 1929 (*Cyprus*), *s.* 7.

By s. 7 of the Criminal Evidence and Procedure Law, 1929, " . . . . any Court before which any person accused of any offence by information is being tried, may receive in evidence, on behalf of the complainant or of the prosecution, the particulars of any complaint or any statement relating to the offence made by the person on whom the offence has been committed. . . . . Provided that the particulars of any such complaint or statement shall not be admissible . . . . unless it appears to the Court . . . . that the complaint or statement has been made . . . . immediately after the commission of the offence, and to the first person or persons to whom the person making the complaint or statement spoke after the commission of the offence, or to the person or persons to whom the Court considers that it was natural that he would complain or make a statement regarding the offence."

The appellant was convicted by an Assize Court in Cyprus of manslaughter, and an appeal to the Supreme Court was dismissed. The defence in substance was that the injuries which caused death were the result of an accident. The trial Court admitted in evidence under the above section a statement made verbally by the injured man; the appellant was present but the statement was in Greek, which he did not understand. Upon appeal to the Privy Council it was contended that apart from the statement there was no evidence of the appellant's guilt, that the section did not make the statement evidence of the facts stated but only of the making of a complaint, and that the conditions prescribed by the proviso for admissibility were not satisfied—(1.) because the statement was not made after the offence, since the offence was not complete until death occurred; (2.) because the injured man first spoke to his wife, and no later statement was admissible even if made to a person to whom it would be natural to make it, as the alternatives were mutually exclusive; (3.) because the trial Court alone had power to admit the evidence, and having admitted it on a mistaken ground the appellate Court could not admit it on a different ground.

Held, that a statement admissible under the terms of the section was evidence of the facts stated, not merely of the making of a complaint;

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* *Present*: LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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that each of the above objections to the admissibility of the statement failed; and that, as there was ample evidence to support the conviction, and a total absence of any violation of the principles of justice, the appeal failed.

Judgment of the Supreme Court of Cyprus affirmed.

APPEAL (No. 111 of 1932) by special leave from a judgment of the Supreme Court of Cyprus (October 15, 1932) dismissing an appeal from a judgment at the Limassol Special Assizes (October 7, 1932) whereby the appellant was convicted of manslaughter and sentenced to six months' imprisonment.

The appeal, which was by special leave granted on December 15, 1932, raised questions with regard to the true construction and effect of s. 7 of the Criminal Evidence and Procedure Law, 1929, of Cyprus.

The terms of the above section and the facts of the case appear from the judgment of the Judicial Committee.

1933. Jan. 22, 24, 25. *Sir William Jowitt K.C.* and *Horace Douglas* for the appellant.

Sir Thomas Inskip A.-G. and *Kenelm Preedy* for the Crown.

The contentions appear from the judgment. Reference was made to *Rex* v. *Foster* (1); *Reg.* v. *Bedingfield* (2); *Reg.* v. *Lillyman* (3); *Reg.* v. *Murat Issmael* (4); *Rex* v. *Hassan Molla Mehmed* (5); *Rex* v. *Sterko* (6); *Rex* v. *Haji Pieri* (7); *Rex* v. *Manoti* (8); as to the practice of the Judicial Committee in criminal matters, to *Vaithinatha Pillai* v. *The King-Emperor* (9); *Knowles* v. *The King* (10); *Mohindar Singh* v. *The King-Emperor* (11); *Abdul Rahman* v. *The King-Emperor* (12), the last as showing that the grant of special leave did not affect the onus upon the appellant—and to *Ibrahim* v. *The King* (13), as to local divergence from the English law of evidence in criminal cases.

(1) (1834) 6 C. & P. 325.
(2) (1879) 14 Cox, 342.
(3) [1896] 2 Q. B. 167.
(4) (1900) 5 Cyprus L. R. 47.
(5) (1908) 8 Cyprus L. R. 78.
(6) (1909) 8 Cyprus L. R. 96.
(7) (1926) 12 Cyprus L. R. 87.
(8) (1927) 13 Cyprus L. R. 1.
(9) (1913) L. R. 40 I. A. 193.
(10) [1930] A. C. 366.
(11) (1932) L. R. 59 I. A. 233.
(12) (1926) L. R. 54 I. A. 96, 105.
(13) [1913] A. C. 599, 609.

Their Lordships, after consultation, stated that they would humbly advise His Majesty to dismiss the appeal, and that the reasons would be delivered later.

Feb. 20. The reasons of their Lordships were delivered by

LORD ATKIN. This was an appeal in a criminal case from a judgment of the Supreme Court of Cyprus given on October 15, 1932, which dismissed an appeal by the appellant from his conviction and sentence at the Limassol Special Assizes on October 7, 1932. Special leave to appeal was granted by His Majesty in Council on December 15, 1932.

The appellant was charged on an information containing two counts: (1.) On or about September 13, 1932, at Limassol, unlawfully causing the death of one Christos Apostolides; (2.) on or about September 13, 1932, at Limassol, by a rash or careless act not amounting to culpable negligence, unintentionally causing the death of Apostolides. The first count was founded on s. 193 of the Cyprus Criminal Code Order in Council, 1928, which provides that "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony called manslaughter." The second count was founded on s. 200 of the same Code.

The appellant was tried by a Court consisting of Crean J. (Acting Chief Justice), Green J. (President of the District Court), and Halid J. (District Judge). The Cyprus procedure does not provide for trial by a jury. He was convicted on the first count and was sentenced to six months' imprisonment. The appeal was heard by Stronge C.J., Sertsios and Fuad JJ., who by a majority (Fuad J. dissenting) dismissed the appeal.

The main question in the case was whether the Courts below were right in admitting a statement made by the deceased man shortly before his death as evidence of the facts. This turns upon the construction placed upon s. 7 of the Criminal Evidence and Procedure Law, 1929.

Before discussing the admissibility of this piece of evidence it is necessary to state the circumstances in which it came to be tendered. The appellant at the material date in

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September, 1932, was a commander in the Royal Navy serving in H. M. S. *Resource.* On the night of September 12 the *Resource* was at Limassol, about to leave the next morning. The appellant came ashore that night, dined with some friends at a hotel, and then went with them to a cabaret known as the "Dionesia." About 1 A.M. a Turkish girl, Nazmie Hassan, came to the "Dionesia." She described herself as a cabaret artist. She worked at the cabaret "Pardon Señora" and at the "Dionesia." The former cabaret is under an hotel known as the "Côte d'Azur," managed by the deceased Apostolides. He was an obese, grey-headed man, sixty-one or sixty-two years old, who had been a schoolmaster for forty-two years. Nazmie had stayed in his hotel for two months when she first came to Limassol, but she was then staying at another hotel, the "Majestic." When she came to the "Dionesia" on the night in question, the appellant left his friends and joined her at her table, where she sat alone. They had some champagne. At about 2 A.M. Nazmie and the appellant left. According to Nazmie, the appellant asked her to go to her hotel with him. She said she would not, but that Apostolides' hotel was a clean hotel and she could take him there to stay. According to the appellant, the girl left him at the "Dionesia"; he walked to the entrance to leave, and was about to get into a cab when the girl gave him to understand that she wanted a lift. She did not want to go to her hotel, the "Majestic," but, as he understood, wanted to drop him at the "Continental," where his friend lived with whom he had dined that night, and then go on. On the way the girl suggested a drink. The cab was stopped, and she took him into what he gathered was an hotel. It is common ground that they both went together into Apostolides' hotel. They went upstairs, where they were met by Apostolides, whose room was on the half-landing between the ground and first floors. He showed them into a bedroom where there were a table, two arm-chairs and two bedsteads without bedding. The case turns upon the events of the next half-hour. The case for the prosecution was as follows: Nazmie said that the appellant asked Apostolides by signs how much he was to pay for the room, produced a 1*l.* note from his note-case, and handed it to Apostolides, who returned immediately with the change. He had brought sheets and blankets for one bed, and when he came back with the change the appellant had taken off his jacket and was lying on the bed. The appellant wanted her to stay, but she told him she was not in a condition to stay; she was unwell. She left him lying on the bed, and, finding she had forgotten her handbag, sent Apostolides into the room to retrieve it. She left the hotel and drove to her own hotel in the cab by which they had driven to the "Côte d'Azur," and which she had ordered to wait.

At the hotel there were staying two visitors, Dimo and Soteriades, who live at Nicosia. They had met after dinner at the "Dionesia" cabaret, had then gone to another cabaret and had returned to the hotel, Soteriades at 1.30 A.M., Dimo at 2 A.M. About fifteen minutes after getting to bed, Dimo heard a noise as if something was falling downstairs; it was a mixed-up noise: he heard men's voices. He got up, looked down the staircase and saw Apostolides lying on his back on the last steps of the staircase. His head was on one of the steps and his feet were on the ground. He says he saw a man whom he did not recognize bending over him with his fist under his chin. The Court have not accepted this part of his evidence. He heard Apostolides say to the man, "Come, I show you the hotel of the woman." The Court were not satisfied these words were used. It was, indeed, proved that Apostolides did not speak English. Dimo then saw Soteriades looking out of his room and saw and heard Apostolides' wife shouting from a window. In the hall, which had a marble floor, the flowerpots and a bicycle were upside down. He and Soteriades went outside and met the appellant coming from the direction of the "Continental" hotel. He asked for a doctor; they asked him where the man was. He led them some yards back (the distance is estimated by witnesses between 80 feet and 80 yards), and they found Apostolides lying on the right of the road near a wall with

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his face covered with blood. They all three lifted him up. Apostolides said something to Dimo in Greek and asked him to interpret it to the appellant. Dimo did not interpret it. This is the statement which after argument was admitted: "The deceased asked me to ask the accused why he beat him, and why was he to blame if the woman had left. He also said let him go and sleep now as the room has been paid." Dimo then went for a doctor, the appellant and Soteriades leading Apostolides to the hotel. When he returned in about five minutes' time the appellant was not there.

Soteriades' evidence was that he had gone to sleep and was awakened by a noise and voices. He heard shouts from a distance. He could not describe the noise, but had said (presumably to the magisterial court) that it was like something falling downstairs. He did not see Apostolides or the appellant in the hall, but when he and Dimo went down, the flowerpots, a barrel, and a bicycle were upset. His evidence as to meeting the appellant and returning with him to Apostolides confirms Dimo's. Before Dimo left, Apostolides said something to him in Greek. He asked if he were to be blamed if Nazmie has gone away and "why did he beat me?" He also said, "I am a poor hotel-keeper." He also says that on the way back, Dimo having gone for the doctor, Apostolides said, "I am not interested in this matter, I am a poor hotel-keeper, why did you strike me?" Apostolides asked him to interpret these words to the appellant, and he did so. The accused said to me, "he did not die, but when he dies let me know to come back." When they got back to the hotel he said to the appellant on the instructions of Apostolides, "you may go to sleep in your room as you have paid for it." The wife of Apostolides, who was sleeping in a separate room from his, said that she was awakened by noises as if a man was choking and as if things were falling to the ground, not as if something were falling down the stairs. She looked out of the balcony of her room and in two or three minutes she saw Apostolides and another man come out of the street door. She called out to her husband and he called out "nothing, nothing." At about 3.15 the policeman who was first called to the scene had a conversation with Apostolides, who said, "I have no complaint." Mr. Cowan, with whom the appellant had dined at the "Continental" hotel and who was one of the party at the "Dionesia," said that when Nazmie came to the cabaret she sat at a table alone and the appellant joined her. When the witness left about 2 A.M., the appellant was not at the table. When the witness returned to his room after a time he saw the appellant as if coming from the small pier. He shouted down to the appellant, who came up to his room. He was excited and annoyed, and said he had had a row with that Turkish girl and a man. He noticed nothing wrong with him: there were no signs about him of having been in a mix-up. A police witness gave evidence of inspecting the hotel at 8.30 A.M. on September 13, and finding stains of blood on the third step of the staircase going up, three stains of blood on the floor of the hall between the first and second step, and two stains on the marble floor at the foot of the staircase. On the wall of the hall at the foot of the stairs he saw marks as if made by heels. Apostolides died in hospital on September 13, between 7.0 and 8.45 P.M. He had been lying semi-conscious since about 9.30 A.M. At the post-mortem examination it was found that there was an extensive fracture of the skull through the right parietal bone extending from the frontal bone to the centre of the occipital bone. There had been extensive hæmorrhage in the cranial cavity from which the man had died. There was a contusion of the right eyelids, upper and lower, purple in colour: the contusion extended on to the right cheek. There were superficial abrasions on the right ear and on the right forearm; there were recent bruises on the right upper arm, forearm and over the left anterior superior spine of the ileum. The medical opinion was that there had been severe diffused violence on the right side of the head. The injury to the eye could have been caused by a blow of the fist. The fracture of the skull could have been caused by a very severe blow on the head. All the injuries could be accounted for by a fall downstairs head over heels. The appellant's ship left Limassol at 6 A.M. on the 13th. Twenty-four hours later at Alexandria he heard of the death of the deceased. He returned to Limassol and on the 19th, when charged by the police, said, on the advice of counsel, that he reserved his defence.

The appellant gave evidence on his own behalf. According to his account, what happened after he and the girl and Apostolides had gone into the upstairs room was as follows. He sat in a chair and suggested beer to the girl: she spoke to the man, and he went away. He then put his hand in his pocket and found he had very little money left, under 2*s*. He told the girl and turned out his trousers pocket. She seemed annoyed and left the room. The manager returned with bedding for one bed. The appellant tried to explain he did not want a bed, but the manager could only talk Greek. He went out of the room, and the appellant waited a few minutes on the chair, as he wanted the girl to get away before he left, thinking the girl was annoyed. He then started downstairs, where he saw Apostolides at the bottom of the top flight, coming up. He met him about the third step from the landing. Apostolides put out his hand and said "shillings," wanting money for the room upstairs. Appellant said "No": he then passed Apostolides and went on down. Apostolides followed and caught appellant by the left upper arm as he was about to start down the second flight. Appellant jerked his own arm away, and the next thing he knew Apostolides was falling down the stairs. He went down immediately, and found Apostolides lying on his right side at the bottom of the stairs, his head to the right, his legs to the left. He was beginning to raise himself up. Appellant assisted him up: he seemed very dazed. He supported him to the outer hall, and Apostolides staggered about with him. He saw no blood on him, but it was semi-dark. After two or three minutes he appeared to be all right. Appellant went into the street and turned towards the "Continental" hotel. Shortly afterwards he found that Apostolides was coming with him and talking. He had gone some distance when he fell on the street. Appellant turned and rendered assistance. Apostolides had blood on his face. Appellant then went back and met Dimo and Soteriades, and went back with them; and then, with the assistance of the Maltese boatmen of the ship's boat, took Apostolides back to the hotel. He waited for a little in the room. Apostolides told him, through Soteriades, that he was all right. He told him to buck up, he was not dead yet. He gave Soteriades his name and ship and told him to wire how Apostolides was. He denied that he gave Apostolides a *1l.* note and got change. Soteriades did not interpret to him what the deceased said on the way back to the hotel. He did not strike the deceased or use any violence to him. He was never excited or annoyed that night. He did tell Cowan he had a row with a Turkish woman and a man; but at no time had he had a row with either, though he had unpleasantness with the girl and an altercation with the man. The assistant registrar of the District Court produced the inventory of the movable property of the deceased, which included no *1l.* note, but apparently included no money at all.

Though the above summary does not relate all the details of the evidence on either side, it narrates sufficiently the substance of the case on either side. The defence contends that without the evidence of the statements made by the deceased the Court could only guess at the happenings of the night in question, and that there was no evidence of any unlawful act by the appellant causing the death of the deceased, and no evidence excluding the reasonable possibility of the appellant's story that the death was accidental, due to the deceased falling downstairs when the appellant lawfully jerked his arm away from the deceased's hold. On the other hand, the prosecution, while contending that apart from the statements there was sufficient evidence to justify conviction, assert that if the statements are evidence of the fact, there is ample evidence upon which the Court could find an unlawful assault by the accused upon the deceased and that the assault caused his death. It is necessary, therefore, to examine the section under which the statement was admitted.

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It is as follows: "*Particulars of immediate complaint may be given in evidence on behalf of the prosecution.*

(7.) Any Magisterial Court before which any person charged of any offence triable summarily with or without consent is being tried, or any Magisterial Court before which a preliminary inquiry on a charge for any offence not triable summarily brought against any person is being held, or any Court before which any person accused of any offence by information is being tried, may receive in evidence, on behalf of the complainant or of the prosecution, the particulars of any complaint or any statement relating to the offence made by the person on whom the offence has been committed, or the person in charge of any property against which the offence has been committed and who was present when the offence was so committed.

Provided that the particulars of any such complaint or statement shall not be admissible on behalf of the complainant or of the prosecution unless it appears to the Magisterial Court before which a preliminary inquiry is being held or the Court before which the accused person is being tried that the complaint or statement has been made, having regard to the circumstances of the case, immediately after the commission of the offence, and to the first person or persons to whom the person making the complaint or statement spoke after the commission of the offence, or to the person or persons to whom the Court considers that it was natural that he would complain or make a statement regarding the offence."

In order to appreciate the meaning of the section, which was obviously intended to amend the law as to evidence in Cyprus, it is necessary to point out that the Courts of Criminal Jurisdiction in Cyprus have always since English control adopted the English law of evidence, subject to Cyprus statutory modifications. The amendment, therefore, must, as the defence contend, be treated as engrafted upon the English system of evidence. So regarded it is said that the section should be read as going no further than an extension of the cases to which the English principle applies of admitting in evidence the fact of a complaint having been made in sexual cases and the like. Whether the fact of the complaint alone is admissible or whether the particulars of the complaint are also admissible, as was decided in *Reg.* v. *Lillyman* (1), neither the complaint nor the particulars are evidence of the facts stated, but are only admitted to show that the subsequent conduct of the complainant was consistent with the charge she or he makes, and also to negative consent on her or his part.

Their Lordships do not think that any such limitations can be read into the section of the Cyprus statute. The words, " the Court on a charge for any offence may receive in evidence the particulars of any complaint or statement on behalf of the complainant or of the prosecution," must mean " receive in evidence in support of the charge and as evidence of the facts to which the statement relates." The conditions imposed are apparently considered sufficient to establish the evidential value of the statement, and to put it for purposes of evidence on the same footing as dying declarations and declarations of deceased persons when once such declarations have become admissible. The reference to any offence and the express application to statements by persons in charge of property in respect of offences against property appear to extend the effect of the evidence far beyond the principle upon which the English doctrine rests. It appears that the Cyprus Courts have always admitted such statements as evidence of the fact, as is made clear in the cases referred to in the judgment of the Chief Justice ; and on this point the judgment of Fuad J., the dissenting judge, agrees. It is also to be observed that these decisions were given before this section, which was first enacted in 1894, was re-enacted in 1929 ; and the re-enactment may properly be considered to have been made on the judicial interpretation of the words used. Their Lordships are satisfied that the decisions of the Court below were right on this point, and that the statements, when admitted, were evidence of the facts stated in them.

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(1) [1896] 2 Q. B. 167.

It was, however, contended that even on this assumption the conditions of admissibility set out in the proviso were not complied with. The statement has to be made "having regard to the circumstances of the case immediately after the commission of the offence." The offence of homicide, it is said, is not completed until the death of the victim: and therefore it is contended that the section, in spite of that express reference to "any offence," does not apply to charges of murder or manslaughter or unintentionally causing death by a rash or careless act. This appears to their Lordships to be too restricted a construction and to sacrifice the obvious meaning of the words to a narrow verbal interpretation. In all cases of assault, whether followed by death or not, the only thing of which the victim can complain or make a statement is the wrongful act or omission from which he is suffering; the consequence, whether it be grievous bodily harm or death, follows in the course of nature once the act has been perpetrated. It would seem remarkable that the admissibility of a statement should depend upon the fate of the declarant up to twelve months afterwards; or that if the declarant died and the case rested mainly on such a statement, the accused might be convicted for an aggravated assault upon him, though not for murder or manslaughter. In the view of their Lordships the words "any offence" are governing words, and the words "after the commission of the offence" must be read as meaning after the commission of the unlawful act or omission on which the charge is made.

A further point was taken that the alternatives in the proviso—the first person to whom the declarant spoke, or the person or persons to whom the Court thinks it was natural he should complain or make a statement—are exclusive: so that the victim, having spoken once after the offence, cannot thereafter make an admissible statement to another though natural person. Here it is said that as Apostolides called out "nothing, nothing," to his wife, the subsequent statements to Dimo and Soteriades, though "natural" persons, are not admissible. Their Lordships think that this construction is wrong; and though it appears to have found favour in Cyprus in one or two assize decisions, the majority of the Supreme Court on Appeal were right in overruling them. No reasonable effect is given to the alternatives, unless the view taken by the Supreme Court is correct.

Lastly, it was said that on the wording of the section the trial Court and the trial Court alone as curia designata can admit the evidence: and that as the trial Court in this case treated the statement to Dimo as being a statement to the first person to whom Apostolides spoke after the offence, ignoring the earlier call to the wife, the appellate Court were bound by the error, and could not treat the evidence as admissible on the true ground of being made to a natural person or persons. It is by no means certain that the trial Court acted on this ground; but, even if they did, this contention is fanciful: the words of the section do not point to the trial Court alone having power to decide the admissibility of the evidence: and the provisions of the Cyprus ordinance as to criminal appeals (Cyprus Courts of Justice Order in Council, 1927, s. 56) give to the appeal Court the powers provided by ss. 3, 4, 5 and 6 of the English Criminal Appeal Act, 1907, under which it would be idle to contend that the powers of the Court of Criminal Appeal are limited as is suggested.

Once it is held that the statements were admissible as evidence of the facts, it becomes obvious that the case is not one in which their Lordships in adherence to the ordinary principles which guide them on criminal appeals could advise His Majesty to alter the decision. The question of the credibility of the witnesses and the weight to be attached to their evidence is for the tribunal of fact. There has been no irregularity of any kind: the evidence has been carefully weighed, and considered with discrimination. It might reasonably produce a different effect upon different minds, as is shown by the judgment of Fuad J., who thought that all reasonable doubt had not been removed. But the trial Court were not bound to accept the evidence of the accused: they had a case where the accused and the deceased were the last two persons in contact, and where in a few minutes the

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deceased was found suffering from injuries which were consistent with assault, and where the deceased in evidence that was admissible said he had been assaulted by the accused. The defence was a bare denial, and there was no suggestion that the assault (if made) was justified. There appears to have been ample evidence upon which the trial Court could find that the accused assaulted the deceased and by the assault caused his death. There is a total absence of any violation of any of the essential principles of justice or of any such miscarriage of justice as evokes the interposition of this Board in criminal appeals. On the contrary,. the accused appears to have had a fair trial before a competent Court: the conviction was affirmed in a very careful judgment by the appellate Court. There was undoubtedly evidence upon which any tribunal could reasonably affirm that the accused was guilty of the offence charged: and there is no ground upon which this Board could advise interference.

For these reasons their Lordships at the hearing felt bound to advise His Majesty that this appeal should be dismissed.

Solicitors for appellant: *Gisborne & Co.*
Solicitors for Crown: *Burchells.*

[PRIVY COUNCIL.]

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RHODESIA RAILWAYS, LIMITED . . APPELLANTS;

AND

RESIDENT COMMISSIONER AND TREASURER, BECHUANALAND PROTECTORATE, AND ANOTHER . . RESPONDENTS.

ON APPEAL FROM THE SPECIAL COURT OF THE BECHUANALAND PROTECTORATE.

Bechuanaland Protectorate—Income Tax—Relief—Income Tax paid in United Kingdom—When Relief recoverable—Bechuanaland Protectorate Income Tax Proclamation (No. 70 of 1922), ss. 17, 51.

The provision in s. 51 of the Bechuanaland Protectorate Income Tax Proclamation, 1922, that no refund of an amount paid in excess of the amount chargeable under the Proclamation may be authorized unless the claim therefor is made within two years after the date when the payment was made, does not apply to a claim by an assessee to recover relief to which he is entitled under s. 17, sub-s. 2, of the Proclamation in respect of income tax payable in the United Kingdom, because under s. 17, sub-s. 1, income is to be assessed without any deduction for income tax there payable. Further, the language of s. 51, in providing that the collector "may" authorize a refund, is inappropriate in the case of an assessee claiming under s. 17, sub-s. 2, a legal right which the collector has no discretion to refuse.

Judgment of the Special Court reversed.

APPEAL (No. 78 of 1932) from a judgment of the Special Court of the Bechuanaland Protectorate (June 22, 1932).

The appellants having paid in November, 1925, and October, 1926, income tax assessed upon them for the respective years 1924–25 and 1925–26, under the Bechuanaland Protectorate Income Tax Proclamation, 1922, brought an action on February 10, 1932, to recover under s. 17, sub-s. 2, relief in respect of income tax paid in the United Kingdom. The tax payable in the United Kingdom had not been finally ascertained and paid until November, 1930.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The only question arising upon the appeal was whether the Special Court had rightly held that the action was time-barred by s. 51 of the Proclamation.

The material provisions of the Proclamation appear from the judgment of the Judicial Committee.

1933. Jan. 13. *Latter K.C.* and *Cyril King* for the appellants referred to *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1), which overruled *Rover* v. *South African Breweries.* (2)

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondents.

Feb. 21. The judgment of their Lordships was delivered by

LORD MACMILLAN. The appellants are a railway company which has its head office in London and owns and conducts an important railway undertaking partly situated in the Bechuanaland Protectorate. They are liable to income tax both in the United Kingdom and in the Protectorate.

For the year to June 30, 1925, the appellants were assessed to income tax by the respondent, the collector of income tax of the Protectorate, under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in the sum of 19,897*l.* 1*s.*, representing income tax at the rate then chargeable on that part of the appellants' income which was earned in the Protectorate. The tax was paid in November, 1925. For the following year to June 30, 1926, the appellants were similarly assessed in the sum of 24,883*l.* 3*s.* 6*d.*, which they paid in October, 1926.

By s. 17 of the Proclamation it is provided that: " (1.) For the purposes of income tax payable under this Proclamation income shall be assessable without any deduction for income tax (including super-tax) payable in the United Kingdom." But provision is made for a certain measure of relief in the immediately following sub-section, which is in the following terms: " (2.) Any person who has paid by deduction or otherwise or is liable to pay income tax under this Proclamation for any year of assessment on any part of his income and

(1) [1921] 1 A. C. 172.

(2) [1918] 2 Ch. 233.

who proves to the satisfaction of the collector of income tax that he has paid income tax in the United Kingdom for that year in respect of the same part of his income shall be entitled to relief from income tax under this Proclamation paid or payable by him on that part of his income at a rate equal to the amount by which the rate of tax appropriate to his case under this Proclamation exceeds half the appropriate rate of United Kingdom tax. . . . ."

For the two years in question the appellants were liable to pay income tax in the United Kingdom on their whole income, including the portion of their income earned in the Protectorate on which they paid tax under the Proclamation, but it so happened that, owing to delays in settling the figures of the appellants' assessment in the United Kingdom, the amount of the United Kingdom income tax payable by them for the years 1924–25 and 1925–26 was not finally ascertained and paid until November, 1930. The appellants were thus not in a position till the end of 1930 to claim the relief provided under s. 17, sub-s. 2, of the Proclamation above quoted. The amount of the relief calculated in terms of the sub-section is agreed to be 1251*l.* 11*s.* 6*d.* for 1924–25 and 3500*l.* 7*s.* 6*d.* for 1925–26.

On the appellants intimating their claim, duly vouched, to these reliefs, they were met with the answer that it came too late and was barred by the terms of the proviso to s. 51 of the Proclamation. That section runs as follows: " 51. If it is proved to the satisfaction of the collector that the amount paid by any person is in excess of the amount properly chargeable under this Proclamation the collector may authorize a refund to such person of any tax overpaid; provided, however, that no such refund may be authorized unless the claim therefor is made within two years after the date when the payment was made." If the proviso just quoted is applicable to the case, then, inasmuch as the claim of the appellants to a refund was not made until 1930 in respect of tax paid in 1925 and 1926, the appellants are out of Court.

In consequence of the refusal of the collector to afford the relief claimed, the appellants brought an action against the respondents in the Special Court of the Bechuanaland Protectorate for payment of the said sums of 1251*l*. 11*s*. 6*d*. and 3500*l*. 7*s*. 6*d*., and the parties joined issue on the sole question whether the appellants' claim was statute-barred. The Court on June 22, 1932, upheld the respondents' plea in bar, and subsequently granted leave to the appellants to appeal to His Majesty in Council.

To quote the appellants' declaration, "All things have happened, all times have elapsed, and all conditions have been fulfilled" to entitle them to the relief provided by s. 17, sub-s. 2, of the Proclamation. It is for the respondents to establish with equal precision that their plea in bar is justified by the terms of s. 51.

Their Lordships observe, in the first place, that under s. 17, sub-s. 1, no deduction in respect of income tax payable in the United Kingdom is permitted in the assessment of income for tax purposes in the Protectorate. The income tax payer in Bechuanaland is thus chargeable with tax on the full amount of his income without any deduction in respect of income tax payable by him in the United Kingdom. But if he can show that he has in fact paid United Kingdom income tax on the same income for the same year, he is to be "entitled to relief" from the income tax paid or payable by him in the Protectorate to the extent provided in s. 17, sub-s. 2. The conditions being satisfied, the Proclamation confers a right to the relief which the income tax payer can enforce.

Now when s. 51 is examined, it appears that it applies only to the case where a person has paid income tax "in excess of the amount properly chargeable" under the Proclamation; in that event the collector "may authorize a refund to such person of any tax overpaid." It cannot be said of the appellants that when they paid their income tax in Bechuanaland for the years 1924–25 and 1925–26 without any deduction for United Kingdom tax they made payments "in excess of the amount properly chargeable" under the Proclamation, for s. 17, sub-s. 1, expressly forbids any such deduction. The sums which they paid were "properly chargeable" against them under the Proclamation, and if they had not paid these sums they could have been compelled to do so. They are not now claiming a refund of any "tax overpaid," for they made no over-payment. What they are asking is relief by way of repayment of a part of what originally they properly paid. The language of s. 51 in providing that the collector "may" authorize a refund in the case of any tax overpaid is inappropriate to the case of a person claiming under s. 17, sub-s. 2, a legal right of relief which the collector has no discretion to refuse. The respondents, in their Lordships' opinion, have not succeeded in showing that the terms of s. 51 fit the case of the appellants' claim, and consequently have failed to establish that the claim is subject to the limitation of two years imposed by the proviso to the section. Their Lordships may appropriately quote from the case of *Roddam* v. *Morley* (1) the following observations of Cranworth L.C.: "I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a statute of limitation. It may often be a very righteous defence. But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment."

In the Court below the fact that s. 51 occurs in a group of sections under the heading "Miscellaneous" was invoked as indicating that it was intended to be of general application to all cases in which a refund of income tax was claimed by a taxpayer, and the circumstance that s. 17, sub-s. 2, provides no procedure for the enforcement of the relief which it confers, while s. 51 is the only section in the Proclamation which deals with refunds by the collector, was also given considerable weight. The difficulty arising from the use of the word "may" was surmounted by reading it as equivalent to "shall," where the prescribed conditions were satisfied. Their Lordships do not find in these arguments any sufficient justification for extending the language of s. 51 so as to make it fit a case to which its terms are inapposite. The Attorney-General drew attention to the fact that s. 17, sub-s. 2, occurs in a part of the Proclamation which has for its heading the general title "Abatements," and, founding on the definitions in s. 6, which enacts that "taxable income" shall mean the income of any person after allowance of all deductions other than abatements, and "taxable amount" shall mean the amount remaining after deducting from any taxable income the abatements allowed, sought to make out that the words "amount properly chargeable" in s. 51 were applicable to the amount chargeable after the deduction of the relief under s. 17, sub-s. 2. But this argument is sufficiently refuted by the provision in s. 17, sub-s. 1, forbidding any deduction for United Kingdom income tax in assessing income for the purposes of tax under the Bechuanaland Proclamation. It is, no doubt, true that if, as their Lordships hold, s. 51 does not apply to claims under s. 17, sub-s. 2, there is no time limit imposed by the Proclamation on such claims, but this affords no justification for remedying the omission judicially, if it be an omission.

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(1) (1857) 1 De G. & J. 1, 23.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Special Court of the Protectorate of Bechuanaland of June 22, 1932, be reversed, and the case be remitted to the Special Court to be disposed of on the footing that the respondents' plea in bar is not well-founded. The appellants will have their costs of the appeal and in the Court below.

Solicitors for appellants: *Coward, Chance & Co.*
Solicitors for respondents: *Gedge, Fiske & Co.*

[PRIVY COUNCIL.]

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RHODESIA RAILWAYS, LIMITED . . APPELLANTS;

AND

COLLECTOR OF INCOME TAX, BECHUANALAND PROTECTORATE . . . RESPONDENT.

ON APPEAL FROM THE SPECIAL COURT OF THE BECHUANALAND PROTECTORATE.

Bechuanaland Protectorate—Income Tax—Deductions—Railway—Renewal of Track—" Repairs "—Capital or Income Charge—Bechuanaland Protectorate Income Tax Proclamation (No. 70 *of* 1922), *s.* 15, *sub-s.* 1 (*a*) (*b*).

The words " repairs " and " renewal " are not expressive of a clear contrast. The fact that the wear of the rails and sleepers of a railway line although continuous is not made good annually does not render the work of renewal, when it comes to be effected, necessarily a capital charge. Expenditure may be a permissible deduction in assessing to income tax, although the benefit derived from it extends beyond the year of assessment.

Upon assessment of the appellants to income tax under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in respect of profits from 394 miles of their railway line in the Protectorate, they claimed to debit 252,174*l.*, which they had expended in the year of assessment in renewing 74 miles of the railway track. The work, which was part of a general scheme of renewal, included the supply of new rails, sleepers, and fastenings, where necessary; steel sleepers were used in place of wooden sleepers for about half the line renewed. The renewal brought back the worn track to normal condition; as renewed it was not capable of giving more service than the original line.

Held, that the appellants were entitled to the deductions claimed, because the sum expended was an outgoing "not of a capital nature" within s. 15, sub-s. 1 (*a*), of the Proclamation, and was " expended for repairs of property occupied for the purpose of trade or in respect of which income is receivable " within s. 15, sub-s. 1 (*b*).

Judgment of the Special Court of the Bechuanaland Protectorate reversed.

APPEAL (No. 79 of 1932) from a judgment of the Special Court of the Bechuanaland Protectorate (June 22, 1922).

The appeal related to an assessment for the year to June 30, 1932, upon the appellants under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in respect of income derived from 394 miles of their railway line situate in the Protectorate. The appellants sought to debit against the profits a larger sum—namely, 252,174*l.*, which they had expended in the year of assessment in renewing the track of 74 miles of the line. The deduction was disallowed by the Collector, and the Special Court dismissed an appeal from his decision. The learned judges of that Court held that the claim was not in respect of an outgoing within s. 15, sub-s. 1 (*a*), of the Proclamation, because it was of a capital nature, nor was it allowable under s. 15, sub-s. 1 (*c*), as a sum expended for repairs of property, because the work was so substantial in amount that it was a reconstruction, not repairs. Alternative claims under s. 15, sub-s. 1 (*a*) and (*f*), were rejected on the ground that a railway line is a work of a permanent nature and the rails and sleepers were not machinery.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The facts of the case, and the material provisions of the Proclamation, appear from the judgment of the Judicial Committee.

1933. Jan. 16. *Latter K.C.* and *Cyril King* for the appellants. The expenditure in question was an outgoing not of a capital nature, and therefore a permissible deduction under s. 15, sub-s. 1 (*a*), of the Proclamation; also it was for repairs to property and therefore within s. 15, sub-s. 1 (*b*). Those provisions overlap. The appellants' property for the purpose of s. 15, sub-s. 1 (*b*), was their whole physical undertaking in the Protectorate, the rails, sleepers and fastenings being merely items of it. Periodical renewal of those items is necessary, and their renewal, without an improvement on the originals, was a proper revenue charge. It is not material that the renewal was not carried out solely for the purpose of earning profit in the year of assessment: *Vallambrosa Rubber Co.* v. *Inland Revenue* (1); *Ward & Co.* v. *Commissioner of Taxes* (2); nor that a large amount of the work was carried out in the particular year: *Ounsworth* v. *Vickers, Ld.* (3)

(1) 1910 S. C. 519; 5 Tax Cas. 529.
(2) [1923] A. C. 145, 148.
(3) [1915] 3 K. B. 267, 274.

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Repairs include the renewal of subsidiary parts of property: *Lurcott* v. *Wakely & Wheeler* (1); *Anstruther-Gough-Calthorpe* v. *McOscar* (2); provided, no doubt, that the old material has not become so worn as to have ceased to exist: *Inglis* v. *Buttery & Co.* (3) In this case no improvement in the original line was effected; *Highland Ry. Co.* v. *Special Commissioners of Income Tax* (4) is therefore distinguishable.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondent. The appellants were allowed a deduction of 41,223*l.* in respect of maintenance of ways and works; they are not entitled to debit also the large sum now claimed. Although s. 15, sub-s. 1 (*b*), does not in terms exclude expenditure of a capital nature as s. 15, sub-s. 1 (*a*), does, it must be so limited. Whether the deduction was permissible was a question of fact, the onus being upon the appellants under s. 40 of the Proclamation. The conclusion of the Special Court was right. The work was described by the appellants themselves as "a complete renewal." The total original cost of the line was about three million pounds, and the renewals when completed will cost about a million and a quarter; they will absorb the whole profit for the next five years. The claim in effect is for a deduction in respect of depreciation of works of a permanent nature, and that s. 15, sub-s. 1 (*c*), expressly says is not to be allowed. [Reference was made to *Rowntree & Co., Ld.* v. *Curtis* (5) and *British Insulated & Helsby Cables* v. *Atherton.* (6)]

Latter K.C. replied.

Feb. 21. The judgment of their Lordships was delivered by

LORD MACMILLAN. The appellants, Rhodesia Railways, Ld., a company registered in the United Kingdom, own a railway between Vryburg and Buluwayo. The line is 588 miles in length, of which 112 miles are in the Union of South Africa, 394 in the Bechuanaland Protectorate and

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(1) [1911] 1 K. B. 905.

(2) [1924] 1 K. B. 716, 734.

(3) (1878) 3 App. Cas. 552, 562, 579.

(4) (1889) 16 R. 950; 2 Tax Cas. 485.

(5) [1925] 1 K. B. 328.

(6) [1926] A. C. 205.

82 in Southern Rhodesia. The company are liable to income tax under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in respect of the profits derived by them from carrying on their undertaking in the Protectorate.

In making their return to the respondent of their income for the year of assessment to June 30, 1931, based on their accounts for the year to September 30, 1930, the appellants debited a sum of 252,174*l.* under the heading "renewals of permanent way" and brought out a loss for the year over all of 97,445*l.* In the notice of assessment subsequently sent to the appellants the respondent wrote back the item of 252,174*l.* deducted by the appellants, thereby converting the loss of 97,445*l.* into a profit of 154,729*l.*, on which latter sum the respondent claimed tax amounting to 17,188*l.* 1*s.* 6*d.* The appellants objected to the assessment in respect of the disallowance of the deduction of 252,174*l.* for renewals of permanent way, and on the respondent overruling their objection they appealed to the Court of the Resident Commissioner, being the income tax appeal Court for the purposes of the Proclamation. The appeal was thereafter on the appellants' application removed under s. 39, sub-s. 6, of the Proclamation to the Special Court of the Bechuanaland Protectorate, by whom it was dismissed on June 22, 1932. Leave to appeal to His Majesty in Council having been granted by the Special Court, the matter now comes before their Lordships for review.

The facts are not in dispute. They were spoken to in evidence by an engineer who had been employed in the work of renewal of the appellants' permanent way and by the appellants' chief accountant. It appears that the track was originally laid down in 1896–97 and was thereafter maintained in ordinary course. In the year in question there was a charge of 41,223*l.* for maintenance of ways and works to which the respondent did not take exception. This normal maintenance involved the occasional replacement of a split rail or a bad sleeper. By November, 1929, the track generally was found to be in a worn and dangerous state and to require heavy repairs beyond what could be dealt with in the

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ordinary way, and a scheme or programme of renewal was adopted. In pursuance of this scheme the appellants first dealt with the bad portions of the line, in which they laid new sleepers, new rails and new fastenings to a length in all of 33½ miles. The line as so relaid was of the same weight as the old line. On a further 40½ miles of track the old rails were relaid but new sleepers were put in, steel sleepers for 38½ miles and wooden sleepers for 2 miles. Of the 394 miles of track in the Protectorate 74 miles were thus the subject of treatment in the year in question. Two additional steel sleepers per rail length were introduced in carrying out the work, but the cost of these additional sleepers, which were regarded as an improvement, was charged by the appellants to capital and was not included in the sum of 252,174*l.* claimed as a deduction. The scrap value of discarded rails and sleepers was credited back to renewals in diminution of the cost of the work. The result of the renewals, apart from the additional sleepers, was to bring the track back to normal condition, and the line as renewed was not capable of giving more service than the original line. The appellants' accountant stated that "from day to day throughout the year charges arise for ordinary maintenance and at certain periods there are periodical repairs or delayed maintenance, and in common railway practice they are distinguished as maintenance in the first named and renewals in the second. This relaying of the line would be periodical." He further stated that for income tax purposes the cost of renewals had been allowed as a deduction in the Union of South Africa and in Rhodesia and that actual expenditure on renewals was also allowed to be deducted in the United Kingdom.

In the Proclamation provision is made for deductions in s. 15, of which the first sub-section, as amended by a subsequent Proclamation of 1929, reads (inter alia) as follows :—

"15—(1) For the purpose of ascertaining the taxable income of any person there shall be deducted from the income of such person—(*a*) losses and outgoings actually incurred in the territory by the taxpayer in the production

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of his income, and including also such expenses incurred outside the territory in the production of the taxable income as the Collector may allow; provided such losses or outgoings are not of a capital nature; (*b*) sums expended for the repairs of property occupied for the purpose of trade or in respect of which income is receivable, and sums expended for the repair of machinery, implements, utensils, and articles employed by the taxpayer for the purposes of his trade; such sums shall be the actual expenditure incurred by the taxpayer during the year of assessment; (*c*) such sum as the Collector may think just and reasonable as representing the diminished value by reason of wear and tear during the year of assessment of any machinery, implements, utensils, and articles used by the taxpayer for the purposes of his trade; provided that where a deduction has been allowed under paragraph (*b*) of this sub-section the Collector shall take into consideration the sum allowed under that paragraph in determining the sum to be allowed under this paragraph; provided that in no case shall any allowance be made for the depreciation of buildings or other structures or works of a permanent nature; . . . . (*f*) an allowance in respect of any machinery, implements, utensils and articles used by the taxpayer for the purposes of his trade which have been scrapped by such taxpayer during the year of assessment, such allowance to be the difference between the original cost to such taxpayer of such machinery, implements, utensils or articles and the total amount arrived at by adding all the allowances made in respect thereof under paragraph (*c*) of this sub-section to any amount or the value of any advantages accruing to the taxpayer in respect of the sale or other disposal of such machinery, implements, utensils and articles."

By s. 40 of the Proclamation the burden of proof that any income is entitled to any deduction is imposed on the person claiming such deduction.

Before their Lordships the appellants maintained that they were entitled to deduct the expenditure in question alternatively under para. (*a*) or under para. (*b*) of s. 15, sub-s. 1. In the Court below it was held that the outgoing

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was of a capital nature and so excluded from the benefit of para. (*a*); and that the work in question was one of reconstruction and not of repair and so excluded from the benefit of para. (*b*).

Their Lordships do not agree with the conclusions reached by the Special Court. In their Lordships' opinion the sum in question was within the meaning of para. (*a*) an outgoing "not of a capital nature" and was "expended for the repairs of property occupied for the purpose of trade or in respect of which income is receivable" within the meaning of para. (*b*). As was pointed out by Buckley L.J. (as he then was) in *Lurcott* v. *Wakely & Wheeler* (1), "'repair' and 'renew' are not words expressive of a clear contrast," and "repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion." The periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway administration. The fact that the wear although continuous is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear, and represented the cost of restoring them to a state in which they could continue to earn income. It did not result in the creation of any new asset; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present.

Nor do their Lordships agree that expenditure in order to form a permissible deduction must have been incurred in the production of the actual year's income which is the

(1) [1911] 1 K. B. 905, 923, 924.

subject of the assessment, if by this it is meant that the benefit of the expenditure must not extend beyond the year of assessment, for very many repairs have the result of enabling income to be earned in future years as well as in the year in which they are effected. In the case of *Ounsworth* v. *Vickers, Ld.* (1), where the expense of dredging a channel and constructing a deep water berth which was undertaken in connection with the launching of a specially large vessel was disallowed as a charge against income, Rowlatt J., a very experienced authority on all income tax questions, expressed his agreement with the view that "assuming that dredging the channel is income expenditure if the respondents dredged year by year, it is none the less income expenditure because the dredging was not done for a year or two because it was not worth while to do so and was only done when it was seriously required to get rid of the mischief which had been growing all the time and which theoretically ought to have been kept down coincidently with its growth."

The appellants received no allowance for depreciation of their rails and sleepers under para. (*c*) and the Court below, following a decision of the Appellate Division of the Supreme Court of the Union under a similar statute, held that they were not entitled to any such allowance, on the ground that a railway line was a work of a permanent nature. Oddly enough, the inference was drawn from this that what the appellants could not get by way of depreciation they cannot have been intended to get by way of repairs. The inference, their Lordships would have thought, was rather the other way—namely, that having been allowed a deduction in name of repairs the appellants were not intended to get a deduction in name of depreciation in respect of the same permanent structure.

Their Lordships find an excellent illustration of the accepted practice in such matters in the United Kingdom, to which the appellants' chief accountant spoke, in the case of the *Highland Ry. Co.* v. *Special Commissioners of Income Tax.* (2) There the Highland Railway Company had relaid

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(1) [1915] 3 K. B. 267; 6 Tax Cas. 671. (2) 16 R. 950; 2 Tax Cas. 485.

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a portion of their main line and in doing so had substituted steel rails of greater weight for the previous iron rails. No question was raised as to the cost of relaying the rails except as regards the additional weight and cost of the improved rails as compared with the original rails. The railway company claimed to deduct the additional cost as a proper charge against revenue on the ground that no permanent improvement of their property had been effected by the substitution of the heavier and costlier steel rails and that they derived no additional revenue from the outlay. The Lord President (Inglis) in rejecting the company's contention said (1): "It must be kept in view that this is not a mere relaying of line after the old fashion. It is not taking away rails that are worn out or partially worn out and renewing them in whole or in part along the whole line. That would not alter the character of the line; it would not affect the nature of the heritable property possessed by the company. But what has been done is to substitute one kind of rail for another—steel rails for iron rails. Now, that is a material alteration, and a very great improvement in the corpus of the heritable estate belonging to the company, and so stated, surely is a charge against capital. All that is done, it will be observed from the details given with reference to this matter, is to charge the price of the rails and chairs—that is to say, the weight in addition to what was the original weight of the rails and chairs. That is the whole charge, and that is a charge made entirely for the improvement of the property—the permanent improvement of the property. Now, [how] that can be anything but a charge against capital, I am unable to see."

The contrast between the cost of relaying the line so as to restore it to its original condition and the cost of relaying the line so as to improve it is well brought out in the passage just quoted, and while the former is recognized as a legitimate charge against income the extra cost incurred in the latter case in the improvement of the line is equally recognized as a proper charge against capital. In the present instance

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(1) 16 R. 954; 2 Tax Cas. 488.

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the renewals effected constituted no improvement; they merely made good the line so as to restore it to its original state. As such, in their Lordships' opinion, they were "repairs" within the meaning of s. 15, sub-s. 1 (*b*), of the Proclamation and the cost of them did not constitute an outgoing of a capital nature within the meaning of s. 15, sub-s. 1 (*a*). It follows that the sum of 252,174*l*. expended on this work by the appellants is deductible from their income for the purpose of ascertaining their taxable income.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Special Court of the Protectorate of Bechuanaland of June 22, 1932, be reversed and the case be remitted to the Special Court with a direction to allow the deduction of 252,174*l*. claimed by the appellants from the respondent's assessment of their taxable income for the year ended June 30, 1931. The appellants will have their costs here and below.

Solicitors for appellants: *Coward, Chance & Co.*
Solicitors for respondent: *Gedge, Fiske & Co.*

[PRIVY COUNCIL.]

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COMMISSIONER OF STAMPS, STRAITS SETTLEMENTS . . . . . . APPELLANT;

AND

OEI TJONG SWAN AND OTHERS . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL, STRAITS SETTLEMENTS.

Straits Settlements—Estate Duty—Movable Property outside Colony—Domicil within Colony—Interpretation of Ordinance—General Words—Intention—Comparison with Imperial Statute—Appeal to Privy Council—Competence of Appeal—Ordinance No. 103 (*Stamps*), *ss.* 68, 73, *sub-ss.* 2, 3 (*Revd. Laws*, 1926).

Movable property situate outside the Straits Settlements of a person domiciled therein is chargeable upon his death to estate duty under Ordinance No. 103 (Stamps) of that Colony. Sect. 68 purports to impose the duty upon all property which passes at death, and s. 73, sub-ss. 2 and 3, show that it was contemplated that property outside the Colony would be chargeable.

Observations with regard to the use of decisions on an Imperial statute in the interpretation of a colonial measure, and the danger of detailed textual comparison between the two enactments for that purpose.

Under the terms of the charter of 1855 of the Court then having jurisdiction, and s. 1154 of the Civil Procedure Code of the Straits Settlements, an appeal lies to H. M. in Council from a decision of the Court of Appeal of the Straits Settlements upon an appeal under s. 80 of Ordinance No. 103 (Stamps).

Blackwood v. *The Queen* (1882) 8 App. Cas. 82, 96 applied.

Winans v. *Attorney-General* [1910] A. C. 27 discussed.

CONSOLIDATED APPEALS (Nos. 62 and 46 of 1932), No. 62 being by special leave from an order of the Court of Appeal, Straits Settlements (Singapore), dated November 30, 1931, affirming an order of Terrell J., dated August 12, 1931; No. 46 being from an order of the Court of Appeal, dated January 9, 1932, refusing leave to appeal from its order above mentioned.

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The respondents were executors of Oei Tjong Swan, who died at Singapore in 1924. The deceased was resident and domiciled in the Straits Settlements, and his will was proved there. The estate of the deceased included, in addition to movable and immovable property in the Colony, movable property situated outside the Colony, consisting mainly of shares in companies having their head offices and carrying on business in Java, and money owing from persons and a company in Java; there was also property in England.

At the date of the deceased's death estate duty was payable under Ordinance No. 103 (Stamps)—see Laws of Straits Settlements, Revised Edition, 1926—the duty being provided for by Chapter IX. (Death Duties).

Estate duty was first imposed in the Colony by the Stamp Ordinance, No. 36 of 1907. Sch. I to that Ordinance, in enacting the scale of duties upon the various kinds of instruments liable thereto, based the amount of duty in the case of "an affidavit and account of estate duty" upon the value of "the estate and effects for and in respect of which probate, or letters of administration, is or are granted." That schedule was repealed by Ordinance No. 12 of 1922, and a schedule enacted which based the amount of duty upon "the principal value of the estate." Subject to that alteration Ordinance No. 103 (Stamps) was in all material respects a re-enactment of the Ordinance of 1907. Chapter IX. of Ordinance No. 103, and art. 1 of Sch. I., were repealed by s. 43 of Ordinance No. 11 of 1929.

The terms of the provisions of Ordinance No. 103 (Stamps) more particularly material to the appeals are set out in the judgment of the Judicial Committee.

The appellant, in certifying under s. 74, sub-s. 12, the duty payable, included movable property situated outside the Colony, excepting property in England on which estate duty had been paid there and which was therefore exempt under an Order in Council of 1925. On an appeal by the present respondents to the Supreme Court under s. 80 of the Ordinance, Terrell J. held that the Ordinance, upon its

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true interpretation, imposed duty only upon property situate in the Colony, and he determined the duty upon that basis. The Court of Appeal (Murison C.J., Thorne and Sproule JJ.) affirmed the decision. The grounds of the judgments appear in substance from the judgment here reported.

The Court of Appeal rejected an application to appeal to the Privy Council, on the ground (following an earlier decision) that it was not competent to them to grant leave, but they granted leave to appeal from that refusal. The appeal in pursuance of that leave was appeal No. 46 of 1932.

Subsequently, the Judicial Committee granted special leave to appeal from the decision of the Court of Appeal as to the interpretation of the Ordinance, and the appeal thereunder was appeal No. 62 of 1932.

1932. Dec. 8, 9, 12, 13. *Sir Stafford Cripps K.C.* and *R. P. Hills* for the appellant. [Appeal No. 62.] Sect. 68, sub-s. 1, of the Ordinance in terms imposed the duty upon all property passing on death. There are only two considerations upon which the generality of the words can be restricted: (1.) comity of nations, (2.) an intention, appearing in other provisions, to restrict the words. It is conceded that by comity of nations the words do not include immovable property outside the Colony, nor movable property outside the Colony if the deceased person was not there domiciled. With regard to the second consideration, there are no words in the Ordinance restricting the general words; on the contrary s. 73, sub-ss. 2 and 3, show that they were intended to include some property outside the Colony. Whether the Ordinance applied to property outside the Colony depends wholly upon the intention shown by its provisions as a whole: *Blackwood* v. *The Queen*. (1) That it affects immovable and movable property differently is because succession to the former depends upon the lex situs, and to the latter on the domicil of the deceased. The method of interpretation adopted by the Courts in Singapore was not legitimate or safe. They compared in detail the wording of the Ordinance with that of the Finance Act, 1894, and applied to that comparison the view which they formed (erroneously, it is submitted) as to the effect of the judgments in *Winans* v. *Att.-Gen.* (1) and *Att.-Gen.* v. *Astor.* (2) In interpreting a colonial measure a decision in England as to an English statute is applicable only if the enactments are in the same terms, as in *Trimble* v. *Hill.* (3) The principle that a tax must be imposed in clear language cannot properly be invoked in this case ; the principle is of limited application : *Cape Brandy Syndicate* v. *Inland Revenue Commissioners.* (4)

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(1) 8 App. Cas. 82, 91, 96.

[Appeal No. 46.] There was a right of appeal under the charter of 1855 and s. 1154 of the Civil Procedure Code, subject to certification under the Code. The decision and " determination " under s. 80 of Ordinance No. 111 was not in the nature of an award as in *Rangoon Botatoung Co.* v. *Collector, Rangoon* (5) ; nor was the jurisdiction merely consultative as in *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay.* (6) The former of those cases was explained in *Secretary of State for India* v. *Chelikani Rama Rao.* (7)

Jenkins K.C. and *K. O'Connor* (with them *Greenland*) for the respondents. [Appeal No. 46.] Special leave to appeal having been granted the respondents present no argument upon this appeal.

[Appeal No. 62.] The Ordinance was purely territorial in its effect. Sect. 71, s. 74, sub-s. 2, and s. 77 are inappropriate to the inclusion of property outside the Colony. The schedule passed in 1907 treated the duty as being equivalent to a probate duty. That schedule remained unaltered until 1922, and until shortly before that date it was not attempted to charge property outside the Colony, nor even to ascertain whether a deceased person was domiciled in the Colony. The words " all property " in s. 68, sub-s. 1, mean all property in respect of which probate is granted. The appellant would

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(1) [1910] A. C. 27.
(2) [1923] 2 K. B. 157.
(3) (1879) 5 App. Cas. 342.
(4) [1921] 1 K. B. 64, 71.
(5) (1912) L. R. 39 I. A. 197.
(6) (1923) L. R. 50 I. A. 212.
(7) (1916) L. R. 43 I. A. 192, 198.

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construe those words as equivalent to "all property within the Colony, and movable property outside it if the deceased was domiciled within it." That is not a possible construction of the words used. By s. 2 of the Ordinance "property" is to include movable and immovable property, and although s. 81 further defines property for the purpose of Chapter IX., no distinction is drawn between the incidence of the duty upon the two classes of property. A taxing measure should be interpreted as applying only territorially unless a clear intention to the contrary appears: *Blackwood* v. *The Queen* (1); *Stamp Duties Commissioner* v. *Salting*. (2) The provisions of s. 73, sub-ss. 2 and 3, are insufficient for that purpose. They are not charging sections, and deal merely with special circumstances which may arise in valuing the estate. Sub-s. 2 permits an allowance in respect of debts owing outside the Colony if the executor chooses to bring into account property outside the Colony; the sub-section refers to duty in respect of property outside the Colony being "paid," not "payable," although elsewhere the Ordinance always speaks of the duty being "payable." [Reference was made to Hanson on Death Duties, 8th ed., pp. 130, 131.] The sub-section can also be accounted for as referring to assets which, though physically outside the Colony, are notionally within it, such as a ship there registered, or a certificate or warrant for shares transferable only in the Colony. Sect. 73, sub-s. 3, is merely ancillary to sub-s. 2, and provides how property outside the Colony, if it comes in at all, is to be valued. A tax can be imposed only by clear and unambiguous words: *Clifford* v. *Commissioners of Inland Revenue* (3); *Partington* v. *Att.-Gen.* (4); *Att.-Gen.* v. *Peek*. (5) Further, by s. 75, sub-s. 1, payment was a condition to the grant of probate, and the duty has all the other attributes of a duty of that nature. It is well settled that the maxim "mobilia sequuntur personam" does not make property liable to a duty of that kind unless the language is very clear:

(1) 8 App. Cas. 82, 91.
(2) [1907] A. C. 449.
(3) [1896] 2 Q. B. 187, 192.
(4) (1869) L. R. 4 H. L. 100, 122.
(5) [1912] 2 K. B. 192, 208.

Blackwood v. *The Queen* (1); *Commissioner of Stamps* v. *Hope* (2); *Henty* v. *The Queen.* (3) The wording of the Ordinance closely follows that of the Finance Act, 1894, but anything showing that the duty was chargeable on property outside the Colony is omitted. Not only is there no provision corresponding to s. 2, sub-s. 2, of that Act, but s. 72, sub-s. 2, of the Ordinance, while otherwise following the wording of s. 6, sub-s. 2, of the Act, omits the words "wherever situate" following "personal property." There is no section in the Ordinance corresponding to s. 20 of the Act, with the result that if the contention for the appellant is right movable property outside the Colony of a person domiciled within it may be subject to double duty. In construing a Colonial measure comparison may be made with English statutes and decisions thereon, although the enactments are not in precisely the same terms: *Lovell & Christmas, Ld.* v. *Commissioner of Taxes.* (4) [Reference was made also to *Thomson* v. *Advocate-General* (5); *In re Dowager Duchess of Manchester* (6); and *Commissioner of Taxes* v. *Union Trustee Co. of Australia.* (7)]

R. P. Hills in reply. The schedule to the Ordinance of 1907 did not carry out the purpose of the Ordinance; it was repealed before the deceased died and no argument can be based upon it. The duty imposed was not in the nature of a probate duty, save in that it was not of the nature of a legacy duty. *Blackwood* v. *The Queen* (8) and *Commissioner of Stamps* v. *Hope* (2) were decided on the view that the duties there considered were really probate duties and nothing else.

1933. Feb. 28. The judgment of their Lordships was delivered by

LORD MACMILLAN. The late Oei Tjong Ham died in Singapore on June 3, 1924. Though not a British subject he was at the time of his death domiciled in the Colony of

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(1) 8 App. Cas. 82, 93, 94.
(2) [1891] A. C. 476.
(3) [1896] A. C. 567.
(4) [1908] A. C. 46, 51.
(5) (1845) 12 Cl. & F. 1.
(6) [1912] 1 Ch. 540, 551.
(7) [1931] A. C. 258, 265, 266.
(8) 8 App. Cas. 82.

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the Straits Settlements. He left a very large estate which, in addition to movable and immovable property in the Colony, also comprised valuable movable assets outside the Colony consisting chiefly of shares in companies in the Dutch East Indies valued at over $27,000,000.

The whole of the deceased's property within the Colony admittedly became liable on his death to estate duty under Ordinance No. 103 (Stamps) then in force in the Colony. The question is whether estate duty is also payable on the deceased's movable property outside the Colony.

The Commissioner of Stamps of the Colony, who is the appellant before their Lordships, in determining the value of the deceased's estate for the purposes of the duty included the value of his movable property outside the Colony. The present respondents, who are the executors under the deceased's will, objected and appealed to the Supreme Court of the Colony. By a judgment of Terrell J., unanimously affirmed by the Court of Appeal, it was held that the deceased's movable property outside the Colony was not liable to estate duty and consequently had wrongly been included by the Commissioner in his valuation.

The Commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council, but leave was refused on the ground that such appeal was incompetent. The Commissioner then petitioned His Majesty in Council for special leave to appeal, which was granted. The Court of Appeal granted the Commissioner leave to appeal against their refusal of leave to appeal to His Majesty in Council, and this appeal has been consolidated with the appeal by special leave on the merits. Their Lordships will deal in the first place with the latter.

Estate duty in the Colony at the date of the deceased's death was imposed and regulated by the Ordinance No. 103 (Stamps) above mentioned.

Sect. 68 of that Ordinance provides as follows: "(1.) In the case of every person dying after the first day of February, 1908, there shall, in the cases set out in article 1 of schedule A,

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be levied and paid upon the principal value ascertained as hereinafter provided of all property which passes on the death of such person a stamp duty called 'estate duty' at the graduated rates mentioned in that article." Sect. 2 of the Ordinance provides that "unless there is something repugnant in the subject-matter or context," "'Property' includes movable and immovable property . . . ." Sect. 81 also contains provisions, immaterial to the present question, as to what is included in the terms "property" and "property passing on the death" for the purposes of the chapter of the Ordinance now under consideration. The provision for the ascertainment of the principal value of property passing on a death is contained in s. 73, sub-s. 4, which directs that the value is to be estimated at the open market price. The duty is payable by stamps affixed to an affidavit delivered by the executor to the Commissioner or, in so far as estate duty is not paid by the executor, by stamps affixed to an account setting forth the particulars of the property and delivered to the Commissioner by the person accountable. Sch. A under the heading, "Description of instrument," contains as the first item, "Affidavit and account of estate duty," and in art. 1 sets out a graduated scale applying stamp duty at rising percentage rates according as the principal value of the estate rises in amount.

It will be observed that estate duty is leviable under s. 68, sub-s. 1, of the Ordinance above quoted on the principal value of "all property" which passes on the death of every person who dies after February 1, 1908. As the deceased died after February 1, 1908, and as his movable property outside the Colony undoubtedly passed on his death, the language of the section plainly covers the case of such property. But it is said that notwithstanding the generality of its language the section must be read subject to certain tacit exceptions, and in particular subject to the exception of property outside the Colony.

It is common ground that immovable property of the deceased situated outside the Colony is not subject to estate duty under the Ordinance although forming part of the property which passed on his death. This is conceded by the appellant on the ground that the Ordinance must be presumed not to infringe the comity of nations by taxing foreign land, which is subject only to the lex loci rei sitae. It is further conceded that the duty extends only to the movable property situated abroad of a person who has died domiciled in the Colony. These are considerable breaches in the universality of the language of the Ordinance, and the respondents at least have the argumentative advantage of starting with the admission in their favour that the words " all property which passes on the death " cannot be read literally but are to be interpreted as subject to substantial implied limitations. This no doubt carries them a certain length but does not absolve them, when they seek to impose a further restriction on the scope of the words, from showing that such restriction is necessitated by the terms of the Ordinance or by some presumption or rule of construction applicable to the case. The fact that the words are subject to certain admitted qualifications does not of itself afford any presumption that they are subject to a further restriction which is not admitted.

The respondents argued that they were entitled to rely on a presumption that the revenue laws of a country do not extend to property outside its territory and that in passing this Ordinance the local legislature must be taken to have intended to affect only property within its own jurisdiction. But " there is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each State levies its taxes " : *Blackwood* v. *The Queen* (1), per Sir Arthur Hobhouse, delivering the judgment of the Board. Indeed, the Colony has now itself in a subsequent Ordinance expressly imposed estate duty on the foreign movables of persons dying domiciled in the Colony. The respondents are thus not able to avail themselves of any general presumption to the effect suggested.

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(1) 8 App. Cas. 82, 96.

They next rely on the character of the duty itself. They assimilate it to probate duty and differentiate it from legacy and succession duty, and invoke the authorities which have established that probate duty though imposed in the most all-embracing terms nevertheless does not extend to property out of the jurisdiction. The estate duty, however, imposed by the Ordinance is neither probate duty nor legacy and succession duty and to discuss whether it more resembles the one or the other is, again to quote *Blackwood* v. *The Queen* (1), "not very profitable."

The answer to the question must be found from an examination of the Ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the legislature has itself said. Is there then any light to be derived from the terms of the Ordinance itself as to the scope of the words "all property which passes on the death" and in particular as to whether these words were intended to include movable property abroad? As it happens there is the clearest indication that the framers of the Ordinance had in view that it would extend to such property. In s. 73 property situate out of the Colony is twice referred to in terms which unmistakably indicate that such property is contemplated as subject to the estate duty imposed by s. 68. Sect. 73, sub-s. 2, runs as follows: "An allowance shall not be made in the first instance for debts due from the deceased to persons resident out of the Colony, unless contracted to be paid in the Colony or charged on property situate within the Colony, except out of the value of any property of the deceased situate out of the Colony in respect of which estate duty is paid; and there shall be no repayment of estate duty in respect of any such debts, except to the extent to which it is shown to the satisfaction of the Commissioner that the property of the deceased situate in the country in which the person to whom such debts are due resides is insufficient for their payment." The sub-section, it will be noted, expressly refers to estate duty paid in respect of property situate out of the Colony. Then comes sub-s. 3, which reads thus: "Where any property passing on the death of the deceased is situate in any country outside the jurisdiction of the Supreme Court and the Commissioner is satisfied that by reason of such death any duty is payable in that country in respect of that property, he shall make an allowance of the amount of that duty from the value of the property." If possible, this sub-section makes it clearer still that property outside the Colony is to be included in the valuation for estate duty.

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(1) 8 App. Cas. 82, 91.

Their Lordships find it impossible to say after reading these sub-sections that the Ordinance did not contemplate that the duty which it imposed should be imposed on property situate out of the Colony or that the language of s. 68 must be held not to have been intended to include such property. Mr. O'Connor, of the Straits Settlements bar, to whose admirable and ingenious advocacy on behalf of the respondents their Lordships are much indebted, endeavoured to avoid the implication of these sub-sections by suggesting that they might have a use in certain abnormal or exceptional cases without actually involving the imposition of the duty, but it is unnecessary to discuss these refinements, for he did not succeed in displacing the plain indication of the language of the Ordinance. The present case is really the converse of *Blackwood* v. *The Queen*. (1) In that case their Lordships discovered in the sections of the statute unmistakable evidence that the general language imposing the tax was not intended to include property situated outside the State of New South Wales. Here a similar examination of the statute has disclosed an even more distinct intention to include property situated outside the Colony of the Straits Settlements.

In the Courts below no satisfactory explanation is given of the presence in the Ordinance of these sub-ss. 2 and 3 of s. 73 or of the clear indication which these sub-sections give that the Ordinance intended to deal with property situated outside the Colony. The learned judge of first instance

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(1) 8 App. Cas. 82.

(Terrell J.) is driven to suggest that they may have been inserted per incuriam through careless drafting. Their Lordships can lend no countenance to such a method of treating a statutory enactment. The learned Chief Justice dismisses the sub-sections as dealing merely with the machinery for the calculation of the taxable estate, and as such ineffective to extend the charging provisions of the Ordinance. Thorne J. deals with them in much the same way. But this is to miss the point. It may well be that provisions dealing merely with the machinery of taxation ought not to be presumed to impose a charge, but statutes must be read as a whole and the language used in so-called machinery sections may be called in aid for the interpretation of the charging sections.

The difficulty in which the learned judges find themselves in accounting for the terms of s. 73, sub-ss. 2 and 3, consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships. Decisions of the Imperial Courts on statutes dealing with the same subject-matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful: cf. *Alcock, Ashdown & Co.* v. *Chief Revenue Authority, Bombay.* (1) But it is quite a different thing to institute a textual comparison such as has here been made and to rely on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model. The basis indeed of the judgments below is to be found in an inference drawn from the fact that while s. 68 of the Ordinance corresponds generally with s. 1 of the (Imperial) Finance Act, the Ordinance contains

(1) (1923) L. R. 50 I. A. 227, 238.

no provision equivalent to s. 2, sub-s. 2, of that Act. The case of *Winans* v. *Att.-Gen.* (1) is then invoked as deciding that without s. 2, sub-s. 2, the language of s. 1 of the Imperial Act would not include foreign personal property, and the conclusion is reached that as the Ordinance does not contain any provision corresponding to s. 2, sub-s. 2, of the Imperial Act, s. 68, sub-s. 1, of the Ordinance, which corresponds to s. 1 of the Imperial Act, must be read as not extending to foreign personal property. Their Lordships cannot accept this reasoning. In the first place, while there are passages in the speech of Lord Atkinson in *Winans* v. *Att.-Gen.* which may well have led the judges in the Courts below to conclude that s. 2, sub-s. 2, of the Finance Act was in the view of that noble and learned Lord an enlarging section without which a narrower interpretation must have been placed on s. 1, their Lordships are by no means satisfied that this is the correct view of the effect of s. 2, sub-s. 2. The other noble and learned Lords who took part in the decision of the case do not so express themselves as regards the effect of s. 2, sub-s. 2.

"It is clear," says Loreburn L.C. (2), "that the language of s. 1 of the Finance Act, 1894, is wide enough to cover the present case, and that the Act does not contain any exception which would withdraw the property in question from the incidence of estate duty." There is here no suggestion that s. 1 contains an inherent restriction to property within the United Kingdom which is removed only by an inference from the terms of s. 2, sub-s. 2. Lord Shaw treats s. 2, sub-s. 2, as an exception from the generality of s. 1, not as expanding its scope, when he says (3): "In the case of an English citizen all his property 'wheresoever situate,' subject to the exception in the Act, is aggregated, and into that aggregation . . . . all personal property situate out of the United Kingdom must come, unless legacy or succession duty would not have been payable in respect thereof."

Their Lordships do not agree with the view expressed by Thorne J. in the present case and adopted by his colleagues that "the effect therefore of this sub-section in England was to bring into charge as property passing on death assets locally situate out of the United Kingdom upon which probate duty would not before the passing of this Act have been chargeable but in respect of which legacy or succession duty was chargeable." On the contrary, their Lordships regard s. 2, sub-s. 2, as excluding from the operation of s. 1 what would otherwise have been included under that section. This is the natural reading of the language of the sub-section, which is expressed in terms of restriction, not of expansion. No doubt the interpretation of the general language of s. 1, on any question arising as to its including property abroad, may be legitimately aided by a reference to s. 2, sub-s. 2, but that is a very different thing from saying that without such aid s. 1 would necessarily be construed as excluding foreign property and that s. 2, sub-s. 2, expands its meaning so as to bring into charge foreign property which would otherwise escape.

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(1) [1910] A. C. 27. (2) Ibid. 30. (3) Ibid. 47.

Starting from their assumption that s. 1 of the Imperial Act would not have included property abroad in the absence of s. 2, sub-s. 2, and reasoning that, as the Ordinance contains nothing corresponding to s. 2, sub-s. 2, s. 68 of the Ordinance, which corresponds to s. 1 of the Imperial Act, must equally be held not to include property out of the Colony, the learned judges below proceed to consider the rest of the Ordinance on the footing that s. 68 of itself does not include property out of the Colony and find nothing elsewhere in the Ordinance to persuade them that it can have any application to such property, notwithstanding the terms of s. 73, sub-ss. 2 and 3, for which they are unable to account. This in their Lordships' view, for the reasons already explained, is a false start and leads to inextricable difficulty.

It may well be that those who had at first to administer the Ordinance were not aware that it gave them the power to tax movable property out of the Colony, and there are indications in the past history of the estate duty in the Colony, as expounded by Mr. O'Connor, which give much support to this view. But the fact that the potency of the weapon confided to them was not fully realized by those who wielded it cannot control the interpretation of the Ordinance now that its true scope has to be judicially ascertained.

Their Lordships accordingly are of opinion that the appeal should succeed and that the judgments below should be reversed.

Passing to what has been designated the procedure appeal, their Lordships have to consider whether it was within the competency of the Court of Appeal to grant leave in this case to appeal to His Majesty in Council. In holding the contrary, the learned Chief Justice stated that he did so "reluctantly and against his own opinion" in deference to a previous decision of his Court in a case of *The King on the Prosecution of the Income Tax Commissioner* v. *The Firms A. R. A. M. and P. A.* (1) in 1922, which he felt himself constrained "from courtesy rather than conviction" to follow. Thorne J. shared the reluctance of the Chief Justice, while Sproule S.P.J. alone championed the soundness of the authority so manifestly distasteful to his colleagues.

Their Lordships did not have the advantage of a full argument on the question, as the respondents, not having any interest in the matter, in view of the special leave to appeal granted by order of His Majesty in Council, did not feel called upon to contest the appellant's submission. The whole ground, however, is adequately explored in the judgment of the learned Chief Justice, whose convincing argument against the decision which he reluctantly reached appears to their Lordships really unanswerable. It is true that the Ordinance in s. 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial charter of 1855 (2) provides for leave to appeal being granted by the Court of the Colony from "all judgments, decrees or determinations made by the said Court of Judicature in any civil cause." And s. 1154 of the Civil Procedure Code (1) provides that subject to certain conditions " an appeal shall lie from the Court of Appeal to His Majesty in Council (*a*) from any final judgment or order." Wider language it would be difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of s. 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council.

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(1) Unreported.

(2) Letters patent granted to the East India Company reconstituting the Court of Judicature for Prince of Wales Island, Singapore and Malacca. See L. R. 6 P. C. 381, 393.

In the result the Commissioner is entitled to succeed in both the consolidated appeals.

Their Lordships will humbly advise His Majesty in the procedure appeal that the appeal be allowed and the order of the Appeal Court of January 9, 1932, except in so far as it deals with costs be recalled with a declaration that it was within the competence of the Court of Appeal to grant the leave to appeal craved in the petition which by that order was dismissed; and in the appeal on the merits, that the appeal be allowed, the order of the Appeal Court of November 30, 1931, and the order of Terrell J. of August 12, 1931, be recalled and the case be remitted to the Supreme Court of the Straits Settlements with a direction to pronounce a judgment finding that the assets Nos. (10) to (17) inclusive of para. 9 of the originating petition No. 4 of 1931 are liable to estate duty in the Colony. In the appeal on the merits the appellant will have his costs both before their Lordships and in the Courts below and any costs paid by the appellant to the respondents other than costs under the order of the Appeal Court of January 9, 1932, will be repaid by the

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(1) See Laws of the Straits Settlements, Revd. Edn., 1926, Ordinance 102.

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respondents; in the procedure appeal, in conformity with an arrangement between the parties of which their Lordships have been informed, the appellant will pay the respondents' costs of and in connection with the petition to consolidate the appeals and the costs of the respondents of and incidental to the procedure appeal subsequent to the petition to consolidate the appeals. There should be a set-off as regards such costs.

Solicitors for appellant: *Burchells.*

Solicitors for respondents: *Nisbet, Drew & Loughborough.*

[PRIVY COUNCIL.]

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Feb. 2.

ANANTAPADMANABHASWAMI . . . APPELLANT;

AND

OFFICIAL RECEIVER OF SECUNDERABAD AND OTHERS . . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

International Law—Foreign Insolvency—Secunderabad Court—Property in British India—Attachment in British India—Inchoate Execution.

Upon a foreign Court adjudicating a person an insolvent, the only property in British India which vests in the receiver by virtue of private international law is such movable property as the insolvent was free to assign to the receiver at the date of the adjudication.

The District Court at Secunderabad adjudicated persons insolvents under the Provincial Insolvency Act, 1907. Jurisdiction is exercised at Secunderabad, and the above Act there applied, by Orders made by the Governor-General in Council under the Foreign Jurisdiction Act, 1890, and the Indian (Foreign Jurisdiction) Order, 1902. The insolvents were holders of a decree of the Madras High Court, which, before the adjudication, had been attached by that Court in execution proceedings. By s. 64 of the Code of Civil Procedure, 1908, any private transfer of the attached decree was void against claims under the attachment.

Held, that the District Court at Secunderabad was a foreign Court; accordingly, the adjudication operated in British India only under private international law and, having regard to s. 64 of the Code, did not affect the rights of the attaching creditor; it was unnecessary to consider whether the attachment created a charge, or conferred title.

Galbraith v. *Grimshaw* [1910] A. C. 508 applied.

Judgment of the High Court, I. L. R. 54 M. 727, reversed.

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* *Present:* LORD TOMLIN, LORD THANKERTON, and SIR GEORGE LOWNDES.

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ANANTA-PADMANABHASWAMI
v.
OFFICIAL RECEIVER OF SECUNDERABAD.

APPEAL (No. 86 of 1931) from a decree of the High Court in its appellate jurisdiction (October 2, 1930) reversing an order of the Court in its original jurisdiction (April 23, 1929).

The question for determination in the appeal was whether under an adjudication in insolvency by the District Court at Secunderabad on September 15, 1928, there vested in the respondent, as receiver, the benefit of a decree obtained by the insolvents in the Madras High Court freed from an attachment previously made by that High Court upon the application of the appellant's father Lakshminarayana, since deceased and represented by the appellant.

The facts are stated in the judgment of the Judicial Committee.

Secunderabad was fixed for a British Cantonment pursuant to art. 4 of a treaty of 1798 between the Nizam and the East India Company. Civil Jurisdiction is exercised in the Administerial Areas of the Hyderabad State, which include the Cantonment of Secunderabad, under an order of the Governor-General in Council, made on December 21, 1925, under the Indian (Foreign Jurisdiction) Order in Council, 1902; the Order of 1925 superseded earlier Orders. In 1913 an Order similarly made applied the Provincial Insolvency Act (III. of 1907) to the Cantonment of Secunderabad; the amending Act (V. of 1920) was not so applied until 1929.

The Appellate Court (Curgenven and Bhashyam Ayyangar JJ.), while agreeing with the view of the trial judge, Kumaraswami Sastri J., that the District Court at Secunderabad was a foreign Court in relation to the Courts of British India, reversed his decision as to the effect of the adjudication. By separate judgments the learned judges held that the claim of the receiver in the insolvency had priority over the claim under the attachment. The appeal is reported at I. L. R. 54 M. 727.

1933. Jan. 16, 17. *Upjohn K.C.* and *Hyam* for the appellant.

Narasimham for the respondents. (1)

(1) The arguments appear from a report at L. R. 60 I. A. 167.

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ANANTAPADMANABHASWAMI
v.
OFFICIAL RECEIVER OF SECUNDERABAD.

Feb. 2. The judgment of their Lordships was delivered by

LORD THANKERTON. This is an appeal from a decree of the High Court of Judicature at Madras dated October 2, 1930, which set aside a judgment and order dated April 23, 1929, made by the same Court in its original civil jurisdiction.

The appellant is in right of a money decree for Rs.53,230–9–0 dated June 15, 1926, made in the Bombay High Court in favour of the appellant's father against three persons, who may be conveniently referred to as the judgment debtors. At that time the judgment debtors were the plaintiffs in a suit then pending in the Madras High Court for partition of certain joint family property between the plaintiffs' and the defendants' branches of the family. The Madras partition suit had been instituted in 1922, and on December 5, 1922, a preliminary decree by consent had been made, declaring (inter alia) certain properties and business assets involved in the suit to be the exclusive properties of the plaintiffs' branch and directing certain interim payments of money to be made by the defendants to the plaintiffs. The decree further directed certain arbitrators to take the joint family account and to partition the joint family property between the two branches of the family in two equal shares. The arbitrators failed to come to any final decision and the matter was referred to the Official Referee of the Court by consent.

On December 20, 1926, the preliminary decree in the Madras suit was attached in the Madras High Court by the present appellant's father, in execution of the decree in the Bombay suit, the execution proceedings having been transferred from the Bombay High Court to the Madras High Court.

In September, 1928, the defendants in the Madras suit applied for a final decree in terms of a compromise entered into between them and the plaintiffs on August 5, 1928, and, on September 21, 1928, the High Court of Madras passed an order for a final decree in the partition suit in terms of the compromise but upon certain conditions, one of which was that the defendants should first pay into Court the amount of money due to the present appellant under the Bombay decree in respect of which the attachment had been made. That order has not been carried out and, in fact, is now under appeal in the Madras High Court.

On September 15, 1928, an order was made by the District Court at Secunderabad, on a creditors' petition, adjudging as insolvents two of the plaintiffs in the Madras partition suit, who are also the judgment debtors (the third plaintiff having died leaving his widow as his legal representative). The Official Receiver of Secunderabad, who is trustee in the bankruptcy, is a respondent in the present appeal.

On March 4, 1929, the appellant's father took out a judge's summons in the High Court of Madras and started the present proceedings against the parties to the Madras partition suit, for leave to execute the decree attached by him. The proceedings were opposed by the defendants in the partition suit and by the Official Receiver of Secunderabad, who was then made a party plaintiff to the partition suit in substitution of the insolvents, the two surviving plaintiffs in that suit, and who is the active respondent in the present appeal.

It is first necessary to consider whether, in the Madras Court, the adjudication order is to be regarded as the order of a foreign Court. Both the Courts below have held that it is to be so regarded and their Lordships agree with that conclusion. It is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court, and referred to in the judgment, in *Hossain Ali Mirza* v. *Abid Ali Mirza*. (1) That reply makes it clear that the British Cantonment in Secunderabad still remains part of Hyderabad State and the property of the Nizam. The administration of justice according to British enactments by the District Court established there does not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts of British India.

There remains the question of what effect is to be given by the Madras Courts to the adjudication order of a foreign Court in competition with the prior attachment of a decree in the Madras Court.

(1) (1893) I. L. R. 21 C. 177, 179.

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The learned trial judge held, under the principles laid down in *Galbraith* v. *Grimshaw* (1), that the present respondent could only take subject to the present appellant's rights of attachment, and made an order continuing the attachment until the further orders of the Court, and giving the appellant leave to execute the preliminary decree in the partition suit. The Appellate Court set aside that order and dismissed the present appellant's application, in substance on the ground that an attachment under the Code of Civil Procedure is purely prohibitory and does not operate to create any title, lien or security in favour of the attaching creditor which, according to British Indian law, could prevail over the receiver in insolvency, and that it made no difference that the adjudication order was made by a foreign Court.

Their Lordships do not agree with the reasoning or conclusion of the Appellate Court. The question is one of comity between States, and not one of the municipal bankruptcy codes of either country. The rule of private international law is clearly laid down in *Galbraith* v. *Grimshaw* as regards movable estate, for it is settled that no adjudication order is recognized as having the effect of vesting in the receiver any immovables in another country.

The reason for the rule is stated in the speech of Lord Dunedin in *Galbraith's* case (2): "Now so far as the general principle is concerned it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Aders* (3) is only one example." This means that, after the date of the foreign adjudication order, it will be recognized as effective, but it is equally clear from the opinions expressed in *Galbraith's* case that it will not be allowed to interfere with any process at the instance of a creditor already pending, even though such process is incomplete, provided that at that date the bankrupt's freedom of disposal was so affected by the process that he could not have assigned the subject-matter of the process to the receiver. As Lord Macnaghten says (1): "The Scottish Court" (the foreign Court) "can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order nisi was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so." In an earlier passage Lord Macnaghten had said: "A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."

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(1) [1910] A. C. 508.
(2) Ibid. 513.
(3) (1874) 2 R. 150.

In the present case, at the date when the foreign adjudication order was made, the appellant was entitled to the benefit of his prior attachment of the decree in the Madras partition suit. The decree was thereby earmarked for the purpose of answering the Bombay money decree, and that inchoate right would have ripened into execution and sale; it is no matter that under s. 73 of the Code of Civil Procedure the appellant would have to share the proceeds of sale with other decree holders; it would still be a valuable right. The Scottish case of *Hunter & Co.* v. *Palmer* (2), in which an arrestment in Scotland was preferred to a posterior English commission of bankruptcy, is very similar to the present case. Arrestment is only inchoate diligence; to complete the transfer and make the arrester's right real a decree of furthcoming (3) must be subsequently obtained, which adjudges the fund arrested to the arrester. No decree of furthcoming had been obtained in the case.

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(1) [1910] A. C. 508, 512.

(2) (1825) 3 Shaw, 402.

(3) See Encyclopædia of the Laws of Scotland, s.v. "Arrestment," para. 1356.

It is irrelevant to consider what effect a British Indian adjudication order would have had on the appellant's prior attachment. The question is what the pending process of attachment would have ripened into, if uninterrupted. Equally, it is irrelevant to point out that a British Indian adjudication order would not be affected by the prohibitory provisions of s. 64 of the Code, as it is not a private transfer ; such an order operates vi statuti, but the foreign adjudication order does not operate in British India vi statuti, but only under the rule of private international law. In *Galbraith's* case (1) Lord Loreburn states the test as follows : "In each case the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it ; but he could not have it unless the bankrupt could himself have assigned it." It is clear in the present case that, by reason of s. 64, the bankrupts could not have assigned their right in the decree which had been attached.

This test renders it irrelevant to consider whether the attachment created a lien or charge or conferred title, and the cases relating to British Indian bankruptcies relied on by the learned judges of the Appellate Court have no bearing on the present question. In *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (2) the Court appears to have ignored the opinion expressed by this Board in *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3), which was cited to them, and to have taken a dictum in the judgment of this Board in *Moti Lal* v. *Karrab-ul-din* (4) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock* v. *Madan Gopal* (5) the case of *Suraj Bunsi Koer* was not referred to, and the dictum from *Moti Lal's* case was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das* v. *Sundar Das Khetri* (1) was also referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Bunsi* was not referred to.

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(1) [1910] A. C. 508, 510, 511.
(2) (1903) I. L. R. 26 M. 673.
(3) (1879) L. R. 6 I. A. 88.
(4) (1897) L. R. 24 I. A. 170, 175.
(5) (1902) I. L. R. 29 C. 428.

Accordingly, their Lordships are of opinion that the decision of the trial judge was right, and they will humbly advise His Majesty that the appeal should be allowed, that the decree of the Appellate Court dated October 2, 1930, should be reversed, and that the order of the trial judge, dated April 23, 1929, should be restored. The appellant will have the costs of this appeal and his costs in the appeal before the Appellate Court.

Solicitors for appellant : *Barrow, Rogers & Nevill.*
Solicitor for respondent No. 1 : *Harold Shephard.*

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(1) (1914) L. R. 41 I. A. 251.

Referred to. ROYAL, ETC. PORCELAIN CO. *v.* RUSSELL. [1949] 2 K. B. 417

Dictum of LORD BUCKMASTER, at p. 411, *considered.* ROYAL CROWN DERBY PORCELAIN CO., LTD. *v.* RUSSELL. [1949] 1 All E.R. 749.

[HOUSE OF LORDS.]

H. L. (Sc.)*
1933
March 17.

BARRAS . . . . APPELLANT;

AND

ABERDEEN STEAM TRAWLING AND FISHING COMPANY, LIMITED . . RESPONDENTS.

Shipping — Seaman — Wages — " Wreck " — Steam Trawler — Six Months' Engagement—Collision—Discharge of Crew pending Repairs.

Statute—Judicial Interpretation—Use of interpreted Word in subsequent Statute—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1.

By s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925: " Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

The words " wreck or loss of the ship " occur in s. 158 of the Merchant Shipping Act, 1894, in connection with seamen's wages, and in *The Olympic* [1913] P. 92 " wreck " was by a majority of the Court of Appeal held to mean damage to the ship rendering her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into.

A seaman was engaged to serve for six months as chief engineer on a steam trawler. On returning to port during the term of six months to discharge a cargo of fish the trawler collided with another vessel and, after making the port under her own steam, went into dry dock for repairs, the crew, including the chief engineer, being paid off. The trawler was laid up for fourteen days, at the end of which time the seaman was re-engaged as chief engineer. He claimed from the owners of the trawler a sum as wages for the time during which the vessel was under repair, alleging that his service had terminated by reason of the " wreck " of the trawler within the meaning of s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925:—

Held, that there was no wreck of the trawler:—

By Viscount Buckmaster, Lord Warrington of Clyffe, Lord Russell of Killowen, and Lord Macmillan, on the ground that the word " wreck " having been used in the Act of 1894 and having received a judicial interpretation must, when used in the same context in the Act of 1925, bear that interpretation unless a contrary meaning is indicated; and that the trawler was not by the collision rendered incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into, but was merely interrupted in so doing;

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* *Present:* VISCOUNT BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

By Lord Blanesburgh on the ground that the decision in *The Olympic*, supra, was, in view of the dissenting judgment of Kennedy L.J., not of sufficient authority to warrant the assumption that the word "wreck" in the Act of 1925 was used in the sense attributed to it by the majority of the Court of Appeal; that the decision of the majority was wrong, and that there was no wreck in *The Olympic* and a fortiori none in the present case.

Held consequently that the seaman could not recover.

Decision of the majority of the First Division of the Court of Session, 1932 S. C. 432, affirmed.

APPEAL from an interlocutor of the First Division of the Court of Session (1), recalling interlocutors of the Sheriff and Sheriff-Substitute of Aberdeen, Kincardine and Banff made in favour of the pursuer, Thomas Barras, a seaman who claimed wages which he said he had lost through the alleged wreck of the steam trawler *Strathclova* belonging to the Aberdeen Steam Trawling and Fishing Company, the defenders.

The pursuer was a marine engineer engaged by the defenders as chief engineer on their steam trawler under a running agreement dated July 4, 1930, whereby he agreed "to serve on board the said fishing boat, which is to be employed Fishing Trawl North Sea, Shetland, West Coast and Faroe until the last day of December 1930, or, if the fishing boat is at sea on that date until the first return to the United Kingdom thereafter." . . . .

On September 25 on her way home to the port of Aberdeen from a fishing trip the *Strathclova* came into collision with another steam trawler, the *Eric Stroud*, and was damaged. She was nevertheless able to make the port of Aberdeen under her own steam on the day of the accident. On the following day she discharged her cargo of fish and went into dry dock for repairs. On the same day her crew, including the pursuer, were paid off and were told that the vessel would be laid up until the repairs were completed.

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(1) 1932 S. C. 432.

On October 10 the vessel was repaired at the cost of 265*l.*, and on the next day the pursuer was re-engaged by the defenders as chief engineer of the *Strathclova.*

He claimed 9*l.* 16*s.* as his wages for the fourteen days during which the vessel was under repair. The Sheriff-Substitute and the Sheriff allowed the claim, holding that on September 25 there was a "wreck" of the *Strathclova* within the meaning of s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925. (1)

The Sheriff, affirming the Sheriff-Substitute, held that a majority of the Court of Appeal in *The Olympic* (2) had interpreted the word "wreck" in s. 158 of the Merchant Shipping Act, 1894, as an injury which renders the ship incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into; that s. 1, sub-s. 1, of the Act of 1925 being in pari materia with s. 158 of the Act of 1894 and having been passed after the decision of *The Olympic* (2), the Legislature must be presumed to have used the word "wreck" in the later Act in the sense attributed by the Court of Appeal to the same word in the earlier Act, unless a contrary intention was indicated.

On appeal to the First Division of the Court of Session the Lord President, Lord Blackburn and Lord Morison agreed that the word "wreck" in the Act of 1925 had the meaning which the same word had in the Act of 1894, but the Court (the Lord President dissenting) held that in the present case the vessel was not rendered incapable of carrying out the maritime adventure which, unlike that in *The Olympic* (2), consisted of a succession of fishing trips and, though interrupted by the collision, was resumed when the ship was repaired; and that consequently there was no wreck of the *Strathclova.* The Court therefore recalled the interlocutors of the Sheriff Court and held that the pursuer was not entitled to the sum claimed. (3)

The pursuer appealed to the House of Lords.

(1) See headnote.

(2) [1913] P. 92.

(3) 1932 S. C. 432.

1932. Nov. 28, 29. *John A. Lillie* (of the English Bar and K.C. of the Scottish Bar) and *Charles A. Settle* for the appellant. The matter in dispute in this appeal is the meaning of the word " wreck " in s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925. Did the appellant's service terminate by reason of the wreck of the *Strathclova*? It is submitted that it did terminate on September 26, 1930, when he and the rest of the crew were paid off, and terminated by reason of the wreck of the vessel. The word " wreck " in relation to seamen's wages has long engaged the attention of the Legislature and the Courts. Sect. 1, sub-s. 1, of the Act of 1925 is an amendment of s. 158 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which ran thus: " Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship . . . . he shall be entitled to wages up to the time of such termination, but not for any longer period." That section was almost a literal reproduction of s. 185 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). The word has been interpreted in *The Olympic* (1), where the plaintiffs had signed articles for a voyage from Southampton to New York (via Cherbourg and Queenstown) and/or if required to any port or ports within the North Atlantic and South Atlantic Ocean trading as might be required until the ship should return to a final port of discharge in the United Kingdom for any period not exceeding twelve months. The ship sailed on September 20, 1911. On the same day she collided with H. M. S. *Hawke* and received injury which prevented her from sailing on an Atlantic voyage. After undergoing temporary repairs at Southampton she proceeded under her own steam to Belfast for more permanent repair, which detained her until November 29. The shipowners discharged the crew on September 22 and the plaintiffs, members of the crew, claimed wages for a month. It was held by Vaughan Williams and Buckley L.JJ., Kennedy L.J. dissenting, that the service of the plaintiffs had terminated by reason of the wreck of

(1) [1913] P. 92.

the ship within the meaning of s. 158 of the Act of 1894. Vaughan Williams L.J. said (1): "I think the word 'wreck' means something less than total loss. I think that, in determining whether the wreck in question has terminated the service of the seaman, the tribunal which has to determine this question must first satisfy itself that the damage, which is alleged to have terminated the service, is physical damage caused at sea by perils of the sea to the ship; and, secondly, that such damage although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture." Buckley L.J. said (2): "I think the question is not whether the vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question, namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract": and later in his judgment (3): "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into." And afterwards, as Lord Wrenbury in your Lordships' House, he explained the decision in *The Olympic* (4) in these words: "There is a 'wreck of the ship' within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure": *Horlock* v. *Beal* (5); and see per Lord Loreburn. (6) The word must bear the same meaning in s. 1, sub-s. 1, of the Act of 1925: *Ex parte Campbell*; *In re Cathcart* (7); *Webb* v. *Outrim* (8), per Lord Halsbury delivering the opinion of the Judicial Committee of the Privy Council. The sub-section is concerned with the seaman's wages; the commercial or maritime adventure is only relevant as being the subject-matter in respect of which the seaman's contract was entered into. A physical injury to the ship which terminates the adventure, the source of the seaman's wages, is a " wreck of the ship " within the meaning of the enactment.

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(1) [1913] P. 103.
(2) Ibid. 106.
(3) Ibid. 107.
(4) [1913] P. 92.
(5) [1916] 1 A. C. 486, 524.
(6) Ibid. 493.
(7) (1870) L. R. 5 Ch. 703, 706.
(8) [1907] A. C. 81, 89.

T. M. Cooper K.C. and *W. A. Murray* (both of the Scottish Bar) for the respondents. The judges in the Court of Session have accepted the definition of the word " wreck " laid down by the Court of Appeal in *The Olympic* (1), and so far were in favour of the appellant. But the majority of their Lordships distinguished the present case from *The Olympic* (1) on the facts. That is the appellant's grievance. The respondents contend, first, that *The Olympic* (1) was wrongly decided and that there was no " wreck " in that case, and a fortiori no wreck in the present case; and secondly that, assuming there was a wreck in *The Olympic* (1), the Court of Session was right in holding that there was no wreck in the present case.

Upon the first point, the history of the law relating to seamen's wages throws light on the meaning of " wreck." In former days a maritime adventure was in truth the joint adventure of shipowner, cargo owners, and seamen. If the ship was wrecked by a peril of the sea the cargo owner lost his cargo, the shipowner lost his freight, and the seaman lost his wages. The position of the seaman was tersely stated in the saying " freight is the mother of wages." (2) This was regarded as a hard rule; it is described by Lord Loreburn in *Horlock* v. *Beal* (3) as " a cruel exception " to the generally tender and benevolent attitude of the law towards seamen in regard to their contracts of service; and it has been altered by a succession of Acts of Parliament all dealing with seamen's wages in case of the wreck or loss of the ship: the Merchant Seamen Act, 1844 (7 & 8 Vict. c. 112), s. 17, allowed the seaman his wages up to the date of the wreck or loss; the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 185, and the Merchant Shipping Act, 1894, s. 158, were to the same effect. The words in connection with which the word "wreck" is used in this statute show clearly that it implies some disaster to the vessel; for example "wreck or loss" in s. 157; "wrecked or rendered unfit to proceed" in s. 331; "damaged, wrecked, sunk or otherwise destroyed" in s. 332; "wreck includes jetsam, flotsam, lagan and derelict" in s. 510; "wrecked, stranded or in distress," in s. 511. Sects. 530 to 534 headed "Removal of Wrecks" contain as a description of a wreck a vessel "sunk, stranded or abandoned." The Act of 1925 is to be read as one with the Merchant Shipping Acts, 1894 to 1923: see s. 7. It is intituled "An Act to give effect to certain draft conventions adopted by the International Labour Conference relating respectively to an unemployment indemnity for seamen in the case of loss or foundering of their ship." . . . . The preamble states "Whereas at Genoa the General Conference of the International Labour Organization of the League of Nations on July 9, 1920, adopted a draft convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship . . . . And whereas it is expedient that for the purpose of giving effect to the said draft conventions such provision should be made as is contained in this Act"; then come the enacting words of s. 1, sub-s. 1, in which the words "wreck or loss" of a ship are used as equivalent to "loss or foundering of their ship" mentioned in the convention.

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(1) [1913] P. 92.

(2) See *The Neptune* (1824) 1 Hag. Adm. 227, 231.

(3) [1916] 1 A C. 486, 492, 493.

Never until the decision in *The Olympic* (1) was it suggested that any event causing a frustration of the adventure, short of a physical destruction of the ship, could be included in the term "wreck." *The Elizabeth* (2) is inconsistent with the imputation of such a meaning to the word. In that case it was held that a quasi-naufragium did not terminate a seaman's engagement. A wreck would have done so. Without destruction of the ship, mere capture did not constitute a "loss" of the ship within s. 158 of the Act of 1894: *Sivewright* v. *Allen* (3); neither did detention by a foreign power: *Horlock* v. *Beal* (4); even though in either case the maritime adventure might be frustrated. It is submitted that the dissenting judgment of Kennedy L.J. in *The Olympic* (1) is to be preferred to the judgments of the majority of the Court. This seems to have been the opinion of Lord Loreburn in *Horlock* v. *Beal*. (2)

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(1) [1913] P. 92.
(2) (1819) 2 Dods. 403.
(3) [1906] 2 K. B. 81.
(4) [1916] 1 A. C. 486.

Secondly, assuming that the judgments of Vaughan Williams and Buckley L.JJ. in *The Olympic* (1) are good law, they do not cover this case. There the maritime adventure was a round voyage lasting at the most for twenty-one days, while the repairs to the ship took thrice that length of time. In the present case the adventure was a succession of fishing voyages or trips lasting nearly six months from July 4 to December 30, which was interrupted for fourteen days between September 22 to October 11, and then resumed. If frustration of the adventure is to be the test for deciding whether there was a wreck of the ship, there was no frustration in this case.

Lillie K.C. in reply.

The House took time for consideration.

1933. March 17. VISCOUNT BUCKMASTER (read by LORD RUSSELL OF KILLOWEN). My Lords, this is an appeal from the First Division of the Court of Session, recalling an interlocutor of the Sheriff that awarded to the appellant the sum of 9*l*. 16*s*. as the amount of wages claimed by him under s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925. This Act, passed to give effect to certain draft Conventions of the International Labour Conference, provided that: "Sect. 1 (1.): Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service,

(1) [1913] P. 92.

(2) [1916] 1 A. C. 493.

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to receive wages at the rate to which he was entitled at that date." And the appellant claims the benefit of that section in the following circumstances.

He is a marine engineer, and the chief engineer of the steam trawler *Strathclova*, the property of the respondents. His engagement was in terms of an agreement under which he was engaged from July 4, 1930, to December 30, 1930, subject to a provision that the agreement might be terminated at any time before that date at the discretion of the owner. It is common ground that it was not so terminated.

On September 25, while returning to Aberdeen, a collision occurred between the *Strathclova* and another steam trawler, which, though a fairly severe one, did not prevent the *Strathclova* from returning to the port of Aberdeen under her own steam on September 25. The crew, including the appellant, were paid off on September 26, and told that the ship would be laid up until the repairs were completed. The repairs were not completed until October 10, and on the 11th the appellant resumed his duties. The amount claimed is the amount of wages for the fourteen days during which the *Strathclova* was under repair, and no question arises as to the amount.

The claim is resisted by the respondents upon the ground that the *Strathclova* was not a wreck within the meaning of the Act of 1925, and that on no consideration can the phrase " wreck " or " loss " within the meaning of the Act be made to apply to the facts of the present case.

The question as to the meaning of the word " wreck " in the Merchant Shipping Act of 1894 where in s. 158 it occurs in the same context and to provide for similar conditions to those covered by the later statute, was the subject of judicial consideration in the case of *The Olympic*. (1) In that case a vessel in the White Star Line, on leaving Southampton for New York, came into collision with H. M. S. *Hawke*. She returned to Southampton, and proceeded, under her own steam, to Belfast, where she was fully repaired, and after nine weeks resumed her place in the Atlantic service. The

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Court of Appeal, from whose judgment Kennedy L.J. dissented, decided that in these circumstances the vessel was a wreck within the meaning of s. 158. Both Vaughan Williams L.J. and Lord Wrenbury, who was then in the Court of Appeal, decided the question by considering the word " wreck " in relation to the service of the seamen, and in the words of the last-named judge (1) " the wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seamen's contract was entered into." The marked contrast between this and the ordinary maritime conception of a wreck is best illustrated in a sentence of Kennedy L.J., who said (2) : " In my view ' wreck ' means such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as ' a congeries of planks.' " This case was referred to later in the opinions given in this House in the case of *Horlock* v. *Beal* (3) without any expression of disapproval though without expressed assent.

The respondents here have based the main part of their case, as explained in the reasons they have given, upon the ground that *The Olympic* (4) was wrongly decided, and that the limited and relative meaning there attributed to the word " wreck " is not the true interpretation of the phrase. I do not think that the consideration of that question is open to this House. It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it.

(1) [1913] P. 107.
(2) Ibid. 115.
(3) [1916] 1 A. C. 486.
(4) [1913] P. 92.

James L.J. in the case of *Ex parte Campbell* (1) expresses this rule in the following terms : " Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." And this opinion was expressed in a case where the learned Lord Justice himself said it was difficult to bring the interpretation within the words of the Act. The same opinion was expressed by Lord Halsbury in delivering the judgment of the Judicial Committee in the case of *Webb* v. *Outrim* (2), and I know of no authority that has in any way weakened the effect of this pronouncement. It is in my opinion a salutary rule and one necessary to confer upon Acts of Parliament that certainty which, though it is often lacking, is always to be desired. It is indeed argued that in the Act of 1925 this rule need not apply, because it was an Act whose stated purpose was to give effect to a draft international convention scheduled to the statute which, by art. 2, had provided that the indemnity against unemployment to the seamen arose only where such unemployment resulted from " the loss or foundering " of the vessel, and that the words in s. 21 must be construed as the equivalent of the phrase in the Convention which the statute was designed to confirm.

To my mind the answer to this is clear. At the time of the passing of the later Act, rights were enjoyed by the seamen under the Act of 1894, which, according to the judicial interpretation of the statute, conferred upon them wider and more extended rights than those contemplated by the Convention, and I think the conclusion is plain, that the Act, while intending to embody the Convention, did not intend to restrict or limit the rights which our seamen already possessed under the earlier statute of 1894. It does not follow that because the Convention had agreed to something less than that which our seamen enjoyed therefore we should reduce their rights down to the lower level. I am very clearly of opinion that the word "wreck" must be construed in the Act of 1925 as it was construed in the Act of 1894.

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(1) L. R. 5 Ch. 703, 706.

(2) [1907] A. C. 81, 89.

There remains the question whether the facts of this case bring it within the principle of *The Olympic.* (1) In other words, whether the damage has caused such an injury that the ship cannot continue "the maritime adventure in respect of which the seamen's contract was entered into," notwithstanding that after repair she could perhaps perform some other adventure. In that case the adventure was a voyage to New York and home, if so desired, by a series of calls at ports in the South Atlantic, and she resumed her place in nine weeks. In this case the fishing trip lasts from five to fourteen days, and the ship generally sailed out after a day and a half in harbour. It was for such an adventure, lasting six months unless terminated, that the appellant was employed, and the point that arises is, was that adventure frustrated? It is impossible to establish any standard by which such a question can be tested, and this case illustrates the difficulty of deciding on which side of the line the facts cause the case to fall. Upon the whole I cannot find sufficient grounds for saying that the opinion of the majority of the Court of Session was wrong, but I think Lord Morison was in error when he thought that the defenders had terminated the contract in exercise of their rights in this respect under the contract. It was not so terminated. Had it been, this question would not have arisen. For these reasons I think this appeal should be dismissed.

LORD BLANESBURGH (read by LORD MACMILLAN). My Lords, this cause, the details of which are before the House, was instituted in the Sheriff Court of Aberdeen really for the purpose of having the question settled by the order of your Lordships whether or not *The Olympic* (1) was rightly decided by the majority judgment of the Court of Appeal. The parties, having reached this House, find themselves confronted with the objection that that question is no longer open to discussion in any Court. The decision in the case of *The Olympic* (1), it is suggested, must be taken to have received the approval of the Legislature in the Merchant Shipping Act, 1925. Upon that suggestion, while fully conscious of the difficulty created by competing considerations, I have reached the conclusion that the correctness or otherwise of the *Olympic* decision still remains a matter fully open to discussion in this House, and I am persuaded that it was wrong. And I proceed at once to examine it, reserving, in the interest of convenient arrangement, until I have completed that task, the statement of my reasons for holding that the question whether it was right or wrong is still at large here.

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(1) [1913] P. 92.

The *Olympic*, one of the greater ocean going liners of her day, sailed from Southampton on her voyage to New York in the forenoon of September 20, 1911. Shortly after leaving port she came into collision off Cowes with H. M. S. *Hawke* and sustained damage to her hull at a point on her starboard side 30 feet from her stern. After the collision she dropped anchor in Cowes Roads, where she remained during the night, returning to Southampton next day under her own steam. Her damage was local, but so far serious that she could not set out again on an Atlantic voyage without some permanent repairs. After receiving temporary repairs at Southampton she proceeded, again under her own steam, to Belfast, where she remained while the permanent repairs were being executed. On November 29, some nine weeks after the collision, she resumed her place on her owners' Atlantic service. That is the whole story of the disaster; set forth here in detail that it may be compared with the account of the stranding of the *Elizabeth*, to be given presently. The plaintiffs in the action were a fireman and seaman of the *Olympic* serving at the time of the collision under articles for what, in substance, was a voyage from Southampton to New York and back. On the vessel's premature return to Southampton on September 22 they were discharged, with the rest of the crew, and were paid their wages to that date, but no more, the owners contending that the payment of these wages was the measure of their liability under s. 158 of the Merchant Shipping Act, 1894, which in their view applied to the case. The plaintiffs, the seamen, on the other hand, contending that s. 158 had nothing to do with them, as there had, in their view, been no wreck of the *Olympic* within the meaning of that section, claimed compensation, under s. 162 of the Act, for their wrongful discharge. That in the action was the issue between the parties—the seamen on the one side, the owners on the other. Did s. 158 apply to the case, as the owners contended, or did it not ? If it did the defendants were right. If it did not the plaintiffs, under s. 162, were entitled to recover a sum which, as to amount, was agreed.

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(1) [1913] P. 92.

Before the case finished a now well known divergence of judicial view disclosed itself. But there were some fundamentals with reference to which there was never any question. It is convenient to recall these now.

The issue turned upon the introductory words of s. 158 : " Where the service of a seaman terminates before the date contemplated by the agreement by reason of the wreck or loss of the ship," and it was never in judicial debate that the section was operative only in a case to which these words applied. Again, with reference to the words themselves, it was not in debate that the position of a seaman as regarded the termination of his service must be ascertained according to the law as at the passing of the Merchant Shipping Act, 1854, in which, as s. 185, the enactment first appeared. The Legislature, said Kennedy L.J. (1), " is referring to two events—wreck and loss—which it regarded as being, at the time of the passing of the Act, recognized causes of termination, namely, the termination by ' wreck ' and the termination by ' loss.' " Nor, again, was it in contest that in 1854, and, perhaps, for generations before, a wreck of a ship resulting in her total loss did bring about the termination of a seaman's agreement. " A total loss by wreck happens. This operates a total loss of wages " : *The Elizabeth.* (2)

(1) [1913] P. 109

(2) 2 Dods. 403, 408.

But clearly there had been no such total loss by wreck in the case of the *Olympic*. "Would any one," Kennedy L.J. asks (1), "sailor or layman, say that the *Olympic*, as she lay at anchor in the Solent after the collision, or when afterwards she was navigating the waters of the Solent under steam on her way back to Southampton, was a 'wrecked' ship, or describe the disaster as the 'wreck' of the *Olympic*?"

The problem to be solved, therefore, was whether in 1854 anything short of a total loss by wreck—whether in particular such a disaster as had happened to the *Olympic*—would have been recognized as a "wreck of the ship" which brought about a termination of her seamen's agreements.

Here, again, on this question it was agreed that direct authority was confined to one decision. "The one authority," said Buckley L.J. (2), "which deals with the meaning of 'wreck' in the sense of casualty to the vessel is *The Elizabeth* (3)," already cited, a decision of Lord Stowell's, and accepted on all sides as of unimpeachable authority. Indeed, the final difference of opinion amongst the learned judges is so directly traceable to their divergent views as to what Lord Stowell actually decided in that case that I asked learned counsel for the appellant in the course of his argument whether the correctness or otherwise of *The Olympic* (4) decision might not definitely be ascertained by the test whether the view of *The Elizabeth* (3) taken by Buckley L.J. or that taken by Kennedy L.J. was correct. I understood him to agree that it might. But whether so or not, I believe it to be a sure test, as I hope now to show.

What *The Elizabeth* (3) actually decided is a matter so completely in difference between Buckley L.J. and Kennedy L.J. that I have thought it desirable to examine the report of the case critically. That examination, while it has disclosed the existence of expressions open perhaps to some ambiguity, makes to my mind the whole judgment, on the presently essential question, so clear as to excite surprise that it should ever have been understood in more than one sense.

(1) [1913] P. 115.
(2) [1913] P. 105.
(3) 2 Dods. 403.
(4) [1913] P. 92.

The *Elizabeth*, a brig, sailed from London in June, 1818, on a voyage to St. Petersburg and back to Portsmouth. She arrived in due course at St. Petersburg, and, having loaded a cargo of hemp and deals, she sailed thence on her return voyage to England on September 25. On September 27, "without the default of any person," she ran on to a reef of rocks near the Island of Gothland. With local assistance and the help of the crew her cargo was unloaded and the brig got off the rocks, and she was brought to Ostergam, where she was laid on shore for the purpose of being examined, her situation being thus summed up by Lord Stowell in his judgment (1): "Here was a ship that had encountered what the law might call a semi-naufragium —full of water, as they themselves" [that is, the seamen] "state, so that they could not live on board. She is put into the hands of foreign carpenters for the course (a protracted course) of necessary repairs. It was doubtful whether she could at all receive such repairs as would restore her to a navigable state. It was by no means doubtful that she could not receive such repairs as would enable her to proceed till after the approach of spring in that climate had restored the seas to a navigable state, so as to allow her a passage."

She was ultimately found to be repairable, and in April, 1819, she arrived in England under the care of a Swedish crew picked up in Gothland. In Gothland, on October 21, 1818, that is nearly four weeks after the stranding, the crew had been discharged by the master. He justified his action on the ground that the *Elizabeth* could not be repaired before the Baltic was blocked with ice, and that their discharge was necessary to avoid the expense of maintaining them in idleness for the whole winter. Their wages up to that date were tendered to them and they went, or were sent, to Elsinore and there they embarked for England, where they arrived in January, 1819. The suit was by Brokershaw, one of the seamen, but it clearly was in effect a test action. The plaintiff claimed his wages under his agreement up to the date of the *Elizabeth's* actual arrival in England in April,

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(1) 2 Dods. 407.

1819, with the expenses of his journey home. That the owners were liable for the expenses was not contested, and this matter need not be further referred to. The main, indeed the only pleaded, defence of the owners was that the men had accepted their discharge at the time it was made, and on the terms offered—namely, their wages to date. On this issue Lord Stowell found against the owners; there had been no acceptance by the men. And he then proceeded to deal with a further question which had not been pleaded, but which in a Court of Admiralty he felt it to be his duty to entertain and decide. Speaking of the *Elizabeth* and of the discharge of the seamen by the master, he says (1): "If . . . . the master had a right to dismiss the mariners upon proper conditions, and with a due responsibility for the performance of such conditions, the want of consent on the part of mariners would not invalidate his act of authority if he possessed it. The only real question in this case is, did he possess such an authority?" My Lords, the form of this question is a little ambiguous and has, I suspect, been a source of misunderstanding. What Lord Stowell meant by it, however, appears from his answer, which was that in the circumstances the termination of the services of the men by the act of the master was in a business sense reasonable as touching the interests of both sides under the agreement, but that the discharge could only be justified as against the men if it carried with it an obligation on the part of the owners to pay proper compensation to them for their loss of wages sustained through the refusal of the owners any longer to be bound by the obligations of the agreements. In Lord Stowell's view the owners' submission that the plaintiff was only entitled to wages up to the moment of discharge by the master was as entirely inadequate as was the plaintiff seaman's counter contention extravagant that he was entitled to wages up to the actual date of the *Elizabeth's* arrival in England with another crew months after the only voyage ever in contemplation would have ended. The proper compensation to be paid to the plaintiff was that, with a free passage to England, he should receive the equivalent of his wages up to the date of his own arrival there in January, 1819, and Lord Stowell explained how that measure of compensation would secure for the plaintiff all that he would have received under his agreement had it been carried out as contemplated by both parties at the time it was entered into.

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(1) 2 Dods. 406.

In order to enable a judgment to be formed upon the divergent views as to Lord Stowell's actual decision, it may be well to ascertain from his judgment its ratio decidendi. It may, I think, be put thus: Where a seaman has been wrongly discharged, *sans cause valable*, upon idle or false pretences, he has in most countries a right to his wages up to the time of the return of the vessel to her original port. But to Lord Stowell it did not seem that that result could be extended to a case where the discharge was occasioned by misfortune approaching to almost a necessity.

"I confess, it appears to me," he said, "that the circumstances in which this vessel was placed did vest in [the master] an authority to discharge his crew upon proper conditions."

The "authority" with which, as I understand it, Lord Stowell treated the master as being vested was not only one conferred by the owners, but was an authority derived from the proper implications of the agreements themselves, for, as he says, it seemed hardly just, where the disaster had arisen from a vis major, an act of God, in contemplation of neither party at the date of their agreement, that the whole of the inconveniences should fall upon one party whilst a new and unexpected benefit for the other was to arise from this common calamity—the benefit of living in ease and safety on shore at his owner's expense. "This," said Lord Stowell, "can hardly be the true rule applicable to such a case, under all possible circumstances that the seaman can insist upon staying with the ship, be the prospect of its return ever so distant, and the most just terms offered for a return to this country."

"I know and feel," he added, "the partiality which the maritime law entertains for this class of men, but it must not override all consideration of justice to other classes, particularly to merchants their employers; for what is oppressive to the merchant cannot but be injurious to the mariner."

Had Lord Stowell been sitting in a Court of equity he might perhaps have described the result in this way: The plaintiff had shown no case for specific relief, but he had shown a right to compensation for the actual loss sustained by him through the owners' determination of his agreement without legal justification. This is the keynote of the judgment. It was never suggested, even by the owners, that the plaintiff's agreement had terminated by reason of the disaster to the *Elizabeth*. It had been determined by the master discharging him four weeks later. The owners always acknowledged liability for his wages up to the date of that discharge. It was because the discharge by the master, while, in Lord Stowell's opinion, impliedly justified in the circumstances, was only sub modo so justified that the plaintiff was held entitled to the compensation awarded him.

The substance and effect of the judgment are thus explained with, as I believe, perfect accuracy by Kennedy L.J. in *The Olympic* (1): " . . . . while (Lord Stowell) held that it was . . . . in the interests of the shipowners 'reasonable' for the master to discharge the crew, the contract with the seamen was not dissolved—did not (to use the language of s. 158) 'terminate,' upon the happening of the disaster to the ship; and that if their services were terminated by the master's act, the owner thereupon became liable to pay compensation to the seaman for the loss of the wages which he could have earned on the voyage for which he had contracted to serve. That is, in principle, exactly what the plaintiffs claim to be their right in the present case; it is the right which the law has recognized in s. 162" [where there is a limitation] "that the seaman's compensation shall not exceed one month's wages. Lord Stowell, not being fettered by any such statutory limitation, awarded the plaintiffs in the case of *The Elizabeth* (2) wages up to the time of their being landed in

(1) [1913] P. 92, 113.

(2) 2 Dods. 403.

their own country, and this was in effect, though not in intention, giving them wages for the whole of the period which the homeward voyage of the *Elizabeth* would have lasted, if she had not been damaged. . . . The damage to the *Elizabeth*, be it observed, was incomparably greater than that suffered by the *Olympic* in the present case. . . . It was indeed very doubtful, in the case of the *Elizabeth*, whether the vessel could ever be repaired . . . . and yet in his judgment Lord Stowell would not describe even the case of the *Elizabeth* as 'naufragium,' 'wreck,' but as 'semi-naufragium,' 'a half-wreck,' and, as I have said, would not hold that the services of the seamen serving on her '*terminated*' *by the disaster*, but held them to be terminable *by the owner* subject to the right—in Lord Stowell's time not a statutory but an equitable right—to be compensated for the loss by being paid wages as and (*sic*) for the period which I have stated from the report."

It is convenient at this point to compare the disaster to the *Olympic* with that to the *Elizabeth*. There must, I think, be complete agreement with Kennedy L.J. that the mishap to the *Elizabeth* was incomparably the greater of the two. Further in the case of the *Elizabeth*, "the wreck of the adventure," so much in the *Olympic* case insisted on by Buckley L.J., was overwhelming. Its completeness in contrast with the similar "wreck" in the case of the *Olympic* is as remarkable as is the fact that quite clearly in Lord Stowell's view it had no effect whatever upon the situation one way or the other. He never even refers to it.

Now, my Lords, if Lord Stowell, on the facts stated by himself, had held that the semi-naufragium to the *Elizabeth* worked a termination of her seamen's agreements, experience in this present case shows that it would have remained a serious question whether any justification for a similar finding in the case of the *Olympic* was thereby disclosed. I do not, however, propose to discuss the decision from that point of view, because it is not too much to say that if Kennedy L.J.'s interpretation of *The Elizabeth* judgment be correct, the final decision in *The Olympic* by a Court which

Lord Blanesburgh.

recognized the authority of *The Elizabeth* was impossible. How, then, was it reached? This brings us to the view taken of Lord Stowell's decision by Buckley L.J., whose judgment alone deals in detail with it. The Lord Justice says (1): "The result of Sir William Scott's judgment in [*The Elizabeth*], so far as it bears upon the question here to be decided, is, I think, that, inasmuch as the vessel had encountered what he called a semi-naufragium (which, as a matter of fact, meant that she was full of water and required necessary repairs to restore her to a navigable state), the seaman's contract had terminated. The judgment goes on to decide what it was that under those circumstances the seaman was entitled to receive—this was held to be gratuitous conveyance home . . . . and payment of his wages until he arrived home. The decision is that the misfortune had arisen from vis major, the act of God, which neither party had in contemplation at the time of the contract, and that the circumstances vested in the master an authority to discharge the crew under proper conditions" (as above stated). "The consequences of termination are now supplied by section 158 of the Act of 1894." . . . .

My Lords, I have set forth at, I fear, excessive length from the report itself both the facts in relation to the *Elizabeth* and Lord Stowell's judgment upon them, in order that within the four corners of this judgment it may be made apparent that in attributing to Lord Stowell a decision that the agreements of the *Elizabeth's* seamen had terminated as a result of her semi-naufragium the Lord Justice paid no heed to any of the following reasons to the contrary:—

(1.) That, as already stated, it was never suggested, even by the owners, that the agreements of the seamen terminated in consequence of the disaster to the *Elizabeth*, or otherwise than as a result of the seamen's discharge from service by the master four weeks later.

(2.) That if Lord Stowell had held the agreements to be terminated as a result of the disaster he could not have awarded any compensation after its date. The semi-naufragium, would have operated in his own words "as a total loss of wages."

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(1) [1913] P. 105.

(3.) That the compensation awarded the plaintiff could not have been Lord Stowell's substitute for that now provided by s. 158 of the Act of 1894. The forerunner of s. 158 was passed in order to remedy the injustice under the common law in Lord Stowell's day, that if his vessel were wrecked or lost in the course of a voyage the seaman had no right to any wages at all.

(4.) That, very clearly, the whole judgment turned on the propriety and effect of the master's discharge of the seamen four weeks after the semi-naufragium. If that disaster had been regarded by Lord Stowell as one terminating their agreements, there was nothing left for the master's discharge to operate upon.

(5.) That so soon as it is shown from his judgment that this discharge was in Lord Stowell's mind the critical thing, it follows that the compensation he awarded is now represented by the limited statutory provision made by s. 162 of the Act, a section which becomes operative in a case where the conditions of s. 158 have not been fulfilled.

My Lords, in the result it is, I suggest, established that the Lord Justice's statement of the position just set forth cannot stand in the presence of the explanation of Lord Stowell's judgment given by Kennedy L.J.

But, my Lords, this view of *The Elizabeth* (1), which, I suggest, is not to be supported, was the foundation upon which the whole of the majority judgment in *The Olympic* (2) was erected.

(1.) It enabled Buckley L.J. to treat a semi-naufragium as a proper foundation for the application of s. 158. It enabled him to disregard Dr. Lushington's judgment in *The Florence* (3), where he said, "In shipwreck the contract continues so long as a plank can be saved," and it enabled him to make a statement for which, apart from his own view of *The Elizabeth* (1), there is, so far as I have been able to find,

(1) 2 Dods. 403.

(2) [1913] P. 92.

(3) (1852) 16 Jur. 572, 573.

no authority anywhere. "The question is not," he says (1), "whether the vessel had been so injured and damaged that she ceased to be a ship of any service to the owners, but a smaller question, namely, whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

But (2.), the most important of all, it opened the way for the Lord Justice to treat the disaster to the ship as being little more than an accident in relation to what was the essential thing, "the wreck of the adventure," a consequence to which, as I have shown, Lord Stowell attached no relevance at all.

Accordingly I reach the clear conclusion that the decision in the case of *The Olympic* (2) was fundamentally wrong; that the opposing view of Kennedy L.J. was right, and that if a case in which the true meaning to be attached to the words "wreck of the ship" in s. 158 had before 1925 come before this House, *The Olympic* (2) decision upon that question must have been overruled. And here is the beginning of the second question raised by this appeal. Is there anything in the Act of 1925 which precludes that question under s. 158 of the Act of 1894 being raised as freely now as it could have been before the later Act was passed ?

Before proceeding to deal with that question I would draw the attention of the House to an observation of the learned Sheriff-Substitute which at more points than one is not without its relevance in relation to it. With the traditional judicial leaning in favour of the seaman, the learned judge expresses his preference for *The Olympic* (2) decision on the ground that the construction which was thereby placed upon the word "wreck" gives to it a far more extensive and beneficial operation, so far as seamen are concerned, than does a construction which would treat "wreck" as merely a special variety of "loss." I do not know whether the learned Sheriff-Substitute in saying this had it in mind that it was on the narrow and not on the extended construction of

(1) [1913] P. 106.

(2) [1913] P. 92.

" wreck " that s. 158, in a statute containing also s. 162, became a seaman's section. Up to the passing of the Act of 1925, it was invariably the owners, and never the seamen, who pressed for the extended construction. It was for the narrower view that the seamen fought in *The Olympic* (1) case, and the seaman's wife in *Horlock* v. *Beal* (2) presently to be discussed. That it was to the interest of seamen so to do is shown both by the result in *The Elizabeth* (3) before the Act of 1854 and by their claim in *The Olympic* (1) after it. It was the Act of 1925 which effected, as an entirely unforeseen by-product I suspect, the *bouleversement* now apparently complete when each side is found repudiating the claims formerly made on its behalf, and embracing those always previously resisted.

With all this in mind, I proceed to a consideration of the second question, and I apprehend that before it can be ascertained whether, as a result of the Act of 1925, the decision in *The Olympic* (1) has been given legislative force, it is necessary to discover what was the precise effect of that decision as pronounced, how far in that sense it had been recognized and acted upon, how far its authority was at any time undoubted, and whether that authority, such as it had been, remained intact at the date of the passing of the Act of 1925.

By the extended meaning it attached to the word " wreck " the effect of the *Olympic* decision was to eliminate from the essential connotation of the term any physical destruction of the ship. Where there had been no " loss " it was, of course, on construction essential, if the section was to apply at all, that " a wreck of the ship " terminating the seamen's agreements had in some sense occurred. And it had occurred, in the view of Vaughan Williams L.J. (4), if the vessel by reason of her injuries were made " unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture " ; it had occurred in the view of Buckley L.J. (5) if she had " ceased to be a ship of service for the purposes of the adventure." Buckley L.J. could not decide whether any injury, other than injury to the hull, would suffice. It was not necessary to do so in that case. But the trifling sufficiency of the injury he had in view to constitute a "wreck" is shown by the illustration which, with a great liner in his mind, he gave (1): "If, for instance, the injury be such as could be repaired within, say, twenty-four hours, it does not follow that the ship cannot perform the contemplated adventure." Vaughan Williams L.J., by making unseaworthiness the test, introduced no such reservations, and it must be presumed, I take it, that in his view any engine trouble, any broken propeller or broken engine shaft, provided only the time required for repair was sufficiently prolonged, must have been a "wreck" within the meaning of the section, entitling the owners of the ship to treat the seamen's agreements as terminated. Now, when the traditional principle is recalled—conceived, be it remembered, for the safety of ships—that a seaman's contract is not lightly dissolved either on his side or on that of the owner, it will, I think, be agreed that these are extreme views. They were, of course, vigorously dissented from at the time by Kennedy L.J. Did they survive up to 1925? I suggest to your Lordships that in their extreme form they had no existence after *Horlock* v. *Beal*. (2)

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(1) [1913] P. 92.

(2) [1916] 1 A. C. 486.

(3) 2 Dods. 403.

(4) [1913] P. 103.

(5) Ibid. 106.

In that case a British ship in the course of a voyage for which a British seaman had signed articles was in the port of Hamburg when war was declared against Germany on August 4, 1914. She was detained by the German authorities; some months later the crew were imprisoned in Ruhleben. In 1916 the ship was still being detained. The action was by the wife of one of the seamen against the owners on an allotment note for his wages. The first question to be decided was whether there had been a "loss of the ship" within the meaning of s. 158. There was no evidence that any physical harm had befallen her, but it was suggested in the Court of Appeal by Phillimore L.J. (3) that in

(1) [1913] P. 108.
(2) [1916] 1 A. C. 486.
(3) [1915] 3 K. B. 627, 642.

considering the meaning of the word "loss" similar considerations touching the adventure might be imported as had in *The Olympic* (1) been applied in the case of "wreck." And an argument to that effect was addressed to this House. It failed; the "loss" referred to in the section was physical loss only. Although *The Olympic* (1) was not directly in point, the decision was referred to by Lord Loreburn, by Lord Wrenbury and by Lord Atkinson. Lord Loreburn says (2): "We were referred to s. 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. . . . . If I am right in thinking that both the words used in this section, namely, 'wreck' and 'loss,' refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic* (1) did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to 'wreck.'"

Lord Wrenbury's words are not less significant. He says (3): "I may dispose of the question upon s. 158 in few words. It was decided in *The Olympic* (1) that there is a 'wreck of the ship' within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word 'loss' in the section. If there have been such a loss as that the adventure has failed as a commercial adventure, the section, I think, applies. But it remains to determine the meaning of the word 'loss.' It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck and a physical loss if it be a loss."

To my mind the result of these two statements is of first importance in the present connection. First of all I take

(1) [1913] P. 92. (2) [1916] 1 A. C. 493. (3) Ibid. 524.

Lord Loreburn to mean that in his opinion in order to satisfy s. 158 there must be a physical "wreck" just as there must be a physical "loss." He sees no inconsistency in *The Olympic* (1) only because "frustration"—he uses, it will be noticed, a strong word—he regards as having been invoked there merely as a test of its completeness, but in no way dispensing with the duty of proving that there had been in fact a physical wreck. His words suggest to me that had he thought the decision went further he would have disagreed with it.

From Lord Wrenbury we have an authoritative interpretation by its principal author of the decision itself. He has stated what was meant by it; and it must now be understood, as I take it, that Vaughan Williams L.J.'s unseaworthiness test is not to be understood too literally; that the Lord Justice's own reservation that something other than hull damage might constitute a wreck is no longer operative; while there must have been a casualty "in the nature of wreck," an entirely new expression. The "wreck," too, like the "loss," must be physical. It is true that Lord Wrenbury considers that the figurative wreck of the commercial adventure may be a consideration applicable to "loss" as to "wreck." I can, however, find no suggestion to this effect in Lord Loreburn's statement, and if "loss" in the section is physical loss, and that only, it is not quite apparent how there can be room for any such reservation. The adventure must surely disappear with the physical loss of the vessel by means of which it was being carried out.

Lord Atkinson also refers to *The Olympic*. (1) And he accepts the decision as correct. But, unfortunately, his acceptance is based exclusively upon a misapprehension in a most vital particular of Lord Stowell's decision in *The Elizabeth*. (2) Speaking of that decision, Lord Atkinson says (3): "The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to his wages up to the date of his discharge" by the master.

(1) [1913] P. 92. (2) 2 Dods. 403. (3) [1916] 1 A. C. 503.

Now, as has already been seen, the decisive point in Lord Stowell's judgment was just that the plaintiff had awarded him his wages, not up to his discharge, but up to his arrival in England three months later. And the mistake on Lord Atkinson's part is vital, because, following his reasoning, it seems clear that if the true facts in that respect had been present to his mind he must, accepting as he did the authority of *The Elizabeth* (1), have disagreed with the majority decision in *The Olympic* (2) and have adopted that of Kennedy L.J. Clearly, he was of opinion that in *The Elizabeth* (1) the plaintiff's agreement was not held to have been terminated by the semi-naufragium, as Buckley L.J. had supposed, but by his subsequent discharge by the master.

How then in 1925 did *The Olympic* decision stand? How must the draftsman of the Act of 1925 have regarded it?—its existence, as I assume, being known to him. First of all, on the report of the case itself, he must have been impressed by the force of Kennedy L.J.'s dissenting judgment, which, on further inquiry, he would have found had been accepted, even in this House, as authoritative on subjects outside this case. Again, after the observations here in *Horlock* v. *Beal* (3), he must have felt assured that the decision in its original form could no longer be relied on as of permanent authority, nor, indeed, as authentic, except in a sense which no reader of the judgment would attach to it, while, so far as it was reached on any distinction between "wreck" and "loss," it was in the gravest danger of extinction on the first effective occasion.

But another circumstance must have struck him. There seems to be no recorded instance of owners having subsequently sought to utilize *The Olympic* (2) decision in their favour. For all that appears in the reports or text-books it had by 1925 become a dead letter. And, indeed, the liability under s. 162, from which, where it was applicable, the decision relieved the shipowners, must have been in most cases too trifling to worry about. Not without warrant was the draftsman if he concluded that in the new Act he might use the words "wreck" or "loss of the ship" in confidence that they would have attributed to them no other than the narrow meaning for which the seamen had always contended. The recent recrudescence of *The Olympic* (1) decision in the Northern fishing fleets, and the changed attitude towards it by each side is doubtless due to the discovery now made that the decision, although originally strongly resisted by them, has placed in the hands of the seamen there a valuable aid in support of claims under the new Act competent to them now for the first time. One must not deny omniscience to a Government draftsman. But it was in Aberdeen, I suspect, that this chance was first seen and taken.

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(1) 2 Dods. 403.

(2) [1913] P. 92.

(3) [1916] 1 A. C. 486.

And this brings me to the Act of 1925 itself. In relation to the problem now being discussed the Act is helpful in a way which I have not found paralleled in any similar case. Its purpose is proclaimed. Not only is it intituled "an Act to give effect to certain draft conventions relating . . . . to an unemployment indemnity for seamen in the case of loss or foundering of their ship," but these words are repeated in the preamble of the Act; the Convention is scheduled to the Act, and in its art. 2 it is again the words "loss or foundering" that are used. Then in the preamble it is recited that it is expedient "for the purpose of giving effect to such draft conventions that such provision should be made as is contained in this Act." Its purpose is accordingly insistently expressed. There can be no question as to the intent of this Act whatever may be the case with most other statutes. As I observed in *Ellerman Lines, Ld.* v. *Murray* (2), the method adopted by the Act, to achieve its purpose, is not, as it might have been, to transfer the international language of the Convention to the body of the statute, but is to translate that language into the phraseology of the Merchant Shipping Acts and to direct that the Act is to become part of and be construed as one with the other acts of that code.

(1) [1913] P. 92.

(2) [1931] A. C. 126, 133.

In s. 1 of the Act, the translation of the Convention words "loss or foundering" is "wreck or loss," words already found in the same connection in s. 158 of the Act of 1894, and the first question is whether the meaning attributable to the words in each of these sections is to be the same. If I am not debarred from an expression of that view by the case of *Ellerman Lines, Ld.* v. *Murray* (1), in which the House construed the word "wages" in s. 1 as a word apart and without reference to its meaning, either in s. 158 or anywhere else in the Acts, then I say now, as I said then with reference to the word "wages," that the meaning to be attached to the words in s. 1 "where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement" is the same as is the meaning to be attributed to the words in s. 158: "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship." In the one case too, as in the other, the question whether the service terminated or not is to be ascertained by reference to the law as it stood at the passing of the Merchant Shipping Act, 1854. It seems to me clear that the condition on which each section is to become operative is the same.

But what is that meaning? I ask the question, first of all, with reference to s. 158. Let it be supposed that the facts in *The Olympic* (2) were reproduced in the case of another liner, and a claim made by the seamen under s. 162 was brought to this House for final decision, can it be doubted that the use of the words "wreck or loss" in the Act of 1925, where, as it clearly appears, they are a translation of the words "loss or foundering" would be pointed to, and rightly so, as the strongest confirmation on the part of the Legislature itself of the correctness of Kennedy L.J.'s views upon the meaning of the word "wreck" as expressed in *The Olympic*. (2)

And, if the question is put with reference to s. 1 of the Act of 1925, is the answer to be reversed? Is it then to be

(1) [1931] A. C. 126.

(2) [1913] P. 92.

said that the decision in *The Olympic* (1) must be treated as now informing the word "wreck" and that, regardless of the fact that the words "wreck or loss" of the section are a translation of the words "loss or foundering" of the Convention and are found in an Act passed to give that Convention effect, still the meaning of wreck is not necessarily more than a temporary unseaworthiness of the ship? And is this answer to be given, although it must be recognized that thereby there is being attached to the word a construction to which seamen had always been opposed?

My Lords, in *Young & Co.* v. *Leamington Corporation* (2), in relation to just such a question as we are now discussing, I find Lord Blackburn saying this: "I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating."

Is it possible for any one, in the face of the Convention and the expressed purpose of the Act of 1925 in this matter "to have no doubt" that *The Olympic* construction, destructive of both, was by the Legislature being permanently attached to the word "wreck"? If the question be permissible there can, I suggest, be no doubt as to the answer.

And, my Lords, the question I think is permissible. For giving to the rule of construction now under discussion its fullest expression, it is in the end a question of legislative intention, and it is not every decision of the Courts that will be regarded as sufficiently authoritative or notorious to suggest any such intention on the part of the Legislature. There is no question as to the existence of the rule. It is in its application that difficulty arises.

One of its best statements is that made by Griffith C.J., and approved by Lord Halsbury, when delivering the judgment of the Privy Council in *Webb* v. *Outrim*. (3) It runs

(1) [1913] P. 92.

(2) (1883) 8 App. Cas. 517, 526.

(3) [1907] A. C. 81, 89.

as follows: "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

That statement is specially valuable because of its insistence on the condition that the interpretation shall be authoritative. It is useful also in that it recalls that the interpretation may result both from judicial decision and from a long course of practice. If the numerous authorities are looked at it will be found, I think, that the foundation for the application of the rule has been discovered in a long course of practice far more frequently than in a judicial decision, particularly where that judicial decision is one of a Court short of this House.

I will give a very notable example of this in a case to which I referred during the argument, but was not able then completely to identify. I have done so since. It is the case of the *Colonial Bank* v. *Whinney*. (1) The question there was whether shares in an incorporated company were choses in action within the meaning of s. 44 of the Bankruptcy Act, 1883. On the corresponding section of the Bankruptcy Act, 1869, it had been held by Bacon V.-C. in 1871, in *Ex parte Union Bank of Manchester* (2), that such shares were not choses in action. That decision had never been questioned, and in 1883 the earlier section was re-enacted in a form unaltered. There, in the opinion both of Cotton and Lindley L.JJ., was a case for the application of this rule. "In my opinion," said Cotton L.J. (3), "Parliament must be taken to have known of that decision, and if they did not intend the same construction to be put upon the expression 'choses in action' in this Act as had been put upon it in a precisely similar proviso of the former Act by a decision which had stood unimpeached for so many years, they would have inserted something to shew that intention, and would not have framed this proviso in the same terms as that of the former Act." Lindley L.J. expressed the same view. (1) The case was brought on appeal to this House. As a pupil of Mr. Buckley, with Sir Horace Davey of counsel for the respondent, I listened to the argument. I heard Sir Horace Davey cite the case of *Ex parte Union Bank of Manchester* (2) (as appears in the report (3)) and claim for it the influence attributed to it by the two Lords Justices. In answer I heard Lord Blackburn say words to the effect that the Legislature was not to be presumed to have before it every decision of every judge of first instance, and he brushed the whole thing aside. Unfortunately the report makes no reference to this incident, but it does show that *Ex parte Union Bank of Manchester* (2) is not referred to in their judgments by any of their Lordships, and that the House held that "shares" were choses in action under the Act of 1883.

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(1) (1885) 30 Ch. D. 261; (1886) 11 App. Cas. 426.

(2) (1871) L. R. 12 Eq. 354.

(3) 30 Ch. D. 278.

To my mind that case is much stronger than the present. *Ex parte Union Bank of Manchester* (2), although the decision of a judge of first instance, was the decision of the Chief Judge in Bankruptcy, sitting in Bankruptcy, pronounced two years after the Act of 1869 was passed. It was a decision which must have been constantly applied in Bankruptcy and it was never subsequently questioned. Here the decision is a decision of the Court of Appeal, but of two members of the Court only, with a most elaborate dissent from the third Lord Justice dealing with a subject upon which he had special knowledge—a decision, moreover, which had been qualified I suggest, almost out of recognition in this House, and even by Lord Wrenbury himself, and with no evidence that it had ever been utilized at the instance of any shipowner. When to all that is added the fact that this decision can only be read into this s. 1 at the price of a partial defeat of the avowed purpose of the statute, it becomes, I suggest to your Lordships, a case outside the rule altogether, however that rule be stated. I have been unable to find any case, at all approaching the circumstances of the present, in which the rule has been applied.

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(1) 30 Ch. D. 284, 285.

(2) L. R. 12 Eq. 354.

(3) 11 App. Cas. 426, 432.

My Lords, I wish to add that while *Ex parte Campbell* (1) will always remain of value for the statement of the rule by James L.J., it cannot be invoked as an illustration of its application. James L.J. there found the application for the rule in his belief that in the Bankruptcy Act of 1861 a section had been brought over from an earlier Act unaltered in its terms, notwithstanding an intervening objection to it by Lord Westbury in a case *Ex parte Alexander.* (2) The Lord Justice, however, was mistaken in his dates. *Ex parte Alexander* (2), which he had himself argued, was not decided until 1863, and the objection then taken by Lord Westbury was removed in the subsequent Bankruptcy Act of 1869. This fact reduces the statement of the Lord Justice to an obiter dictum. I do not suggest that coming from such a source it is really less valuable on that account. But the case is not otherwise in point.

My Lords, in my judgment there was in this case no "wreck" of the *Strathclova* within the meaning of s. 1 of the Act of 1925 or of s. 158 of the Act of 1894. The appellant's claim as pursuer in the cause fails in limine, and for that reason both his action and this appeal should, I think, be dismissed.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an interlocutor dated February 5, 1932, whereby the First Division of the Court of Session by a majority (Lords Blackburn and Morison, the Lord President dissenting) allowed an appeal from interlocutors of the Sheriff and Sheriff-Substitute dated respectively November 17 and July 28, 1931, allowing the claim of the appellant as pursuer in the action.

The appellant was a seaman on the steam trawler *Strathclova*, of which the respondents were the owners, under the terms of a running agreement dated July 4, 1930, and was by that agreement engaged for a period from July 4, 1930, to December 30, 1930. His claim in the action was founded on s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, and was for wages as provided by that Act. The section in question is as follows: "(1.) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in s. 158 of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

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(1) L. R. 5 Ch. 703.

(2) (1863) 1 De G. J. & S. 311.

Sub-s. 2 contains provisions restricting the right to wages under certain conditions not alleged to be applicable to the present case.

Sect. 158 of the Merchant Shipping Act, 1894, provides that "where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of"—an event not applicable in the present case—"he shall be entitled to wages up to the time of such termination, but not for any longer period." Thus the Act of 1925 gives to the seaman, in the event specified in both Acts, a claim to wages more extensive than that to which he would have been entitled under the Act of 1894, and is in effect an amendment of that Act.

Two questions arise for decision:—

(1.) Whether on the true construction of the Act of 1925 the event of a wreck or loss of the ship has occurred?

(2.) Whether if so the seaman's service was terminated by reason of such wreck or loss?

In considering these questions I need not state the facts in detail, but will give a short summary only.

The seaman's service in this case was to be on board the *Strathclova*, a steam trawler to be employed "fishing trawl North Sea Shetland West Coast and Faroe" from July 4, 1930, until the last day of December, 1930, or, if the boat should be at sea on that date, until the first return to the United Kingdom thereafter. But it was agreed that subject to the above stipulation the agreement might be terminated at any time before that date at the discretion of the owner. It is common ground that under such an engagement the parties contemplated a series of short trips to the fishing ground each ending in a return to the home port followed in due course by another trip. Before this House counsel agreed that as a rule the maximum length of a trip would be fourteen days and the minimum five days, and the normal interval in the home port would be one day and a half. The venture was therefore one of practically continuous fishing for the period of the agreement.

On September 25, 1930, the *Strathclova* when at a distance of one mile to one mile and a half from her home port, the harbour of Aberdeen, came into collision with another steam trawler and was considerably damaged. She was, however, able to make the harbour of Aberdeen under her own steam, was moored near the Fish Quay, and discharged her cargo there on September 26. She was then dry-docked for the purpose of effecting the repairs rendered necessary by the collision. These were completed on October 10, and on October 11 the appellant was re-engaged and resumed his employment. The fishing trips were then resumed. In the meantime, on September 26, the crew including the appellant were paid off, being told that the ship would be laid up until the repairs were completed. In the interval the appellant was unemployed.

On these facts the first question is: Was the accident to the *Strathclova* a "wreck" within the meaning of the Act of 1925?

In my opinion this question should be answered in the affirmative, the point being settled by authority.

In the case of *The Olympic* (1) it was decided by a majority in the Court of Appeal (Vaughan Williams and Buckley L.JJ.; Kennedy L.J. dissenting) that the "wreck or loss" of the ship referred to in s. 158 of the Merchant Shipping Act, 1894,

(1) [1913] P. 92.

includes any accident occasioned by a peril of the sea which renders the ship unfit or unable to proceed on the voyage. It was further decided on the facts of that case that the mercantile venture on which the ship was then engaged was frustrated by reason of the wreck, and the services of the seamen were accordingly terminated. But on this point it may be, and the Court of Session have so decided, that on the facts this case should be decided the other way. This is of course the second question I have put to myself.

To return to the first question, the case of *The Olympic* (1) clearly decided the point. It is, however, a decision of the Court of Appeal, and would prima facie be open to review in this House. For myself I should not, I think, differ from the view of the Court of Appeal even if I thought myself at liberty to decide the other way, but this is immaterial if it be true that this House is not now at liberty to overrule their decision.

The present case is in my opinion covered by the judgment of James L.J. in *Ex parte Campbell; In re Cathcart.* (2) The question there was whether under s. 216 of the Bankruptcy Act, 1861, a particular interrogatory was covered by the words of the section and was therefore one which the witness was bound to answer. The point had been decided against a witness in a case of *Ex parte Vogel* (3), under a previous Act of Parliament containing practically the same words as those afterwards employed in the Act of 1861. The learned Lord Justice said this (4): "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

Counsel were unable to refer us to any case in which the view of James L.J. had been questioned. It is particularly applicable in the present case, because in the Act of 1925,

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(1) [1913] P. 92.
(2) L. R. 5 Ch. 703.
(3) (1818) 2 B. & Ald. 219.
(4) L. R. 5 Ch. 706.

Lord Warrington of Clyffe.

which professed to give effect to an International Convention in which the words "loss or foundering" in a similar context were used, the Legislature have used the words "wreck or loss" appearing in the Act of 1894 which had previously received the interpretation in question. For these reasons therefore I think the first question must be answered in the affirmative—namely, that the accident to the *Strathclova* was a wreck within the meaning of the statute.

There then arises the second question—namely, was the service of the seaman terminated by reason of the wreck? This question was answered in the affirmative by the majority of the Court in *The Olympic* (1) on the ground that the whole mercantile adventure was frustrated by the wreck. Vaughan Williams L.J. expresses the ground of his conclusion in the following terms (2): "such damage," (namely, the damage occasioned by the wreck) "although repairable, would make the ship unseaworthy for so long a time as to make the continuance of the voyage useless as a commercial venture." Buckley L.J. says (3): "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into."

In the present case the mercantile adventure in respect of which the seaman's contract was entered into was not merely for a single voyage. It was for a series of fishing trips, each of short duration, extending over several months. The repairs took fourteen days only to complete, and on this being done the ship resumed her fishing trips and continued them until the time fixed by the contract. Under these circumstances I agree with Lord Blackburn and Lord Morison that the service of the seaman was not terminated by reason of the wreck, and accordingly the seaman was not entitled to the benefit of the Act of 1925.

The third plea in law originally set up by the respondents, founded on the averment that the seaman's service was terminated in terms of his contract, was withdrawn, and in my opinion rightly withdrawn. It is true that the

(1) [1913] P. 92. (2) Ibid. 103. (3) Ibid. 107.

Lord Warrington of Clyffe.

contract contained a provision that it might be terminated at any time at the discretion of the owner. But I think it is plain that in paying off the men on September 26, 1930, the owner did not purport to act on this provision, for the Sheriff-Substitute finds as a fact (No. 8) that the crew were told at the time of paying off that the ship would be laid up until the repairs were completed, and we know that on this being done the fishing trips were renewed.

On the whole I am of opinion that the interlocutor appealed from should be affirmed and this appeal dismissed with costs.

Lord Russell of Killowen. My Lords, the case of *The Olympic* (1) decided, in reference to the words "wreck or loss" which occur in s. 158 of the Merchant Shipping Act, 1894, that the word "wreck" meant something different from and less than "loss," and that in that section the wreck of the ship meant anything happening to the ship which rendered her incapable of carrying out the maritime adventure in respect of which the seaman's contract had been made.

Some twelve years later, *The Olympic* decision (1) having in the meantime governed the construction of the section, the Legislature enacted the Merchant Shipping (International Labour Conventions) Act, 1925. That Act shows by its full title and by its preamble that its object is to give effect to certain draft conventions which had been adopted by the International Labour Conference relating to (among other things) "an unemployment indemnity for seamen in case of loss or foundering of their ship." The draft conventions referred to are set out in the First Schedule to the Act. Sects. 1 and 7 of the Act run thus:—

Sect. 1, sub-s. 1: "Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date."

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(1) [1913] P. 92.

Sub-sect. 2: "A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day."

Sub-sect. 3: "In this section the expression 'seaman' includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing-boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat."

Sect. 7: "This Act may be cited as the Merchant Shipping (International Labour Conventions) Act, 1925, and shall be construed as one with the Merchant Shipping Acts, 1894 to 1923, and those Acts and this Act may be cited together as the Merchant Shipping Acts, 1894 to 1925."

The effect of s. 7 has been succinctly stated by one of your Lordships in the *Ellerman Lines* v. *Murray* case (1), where he uses the following language: "The Act . . . . of 1925 thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result of course is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the very same words in an independent enactment."

On looking at s. 1, we find that Parliament, in legislating for the purpose of carrying out the draft convention, has used in the first three lines of s. 1 words which are for all relevant purposes the same as those in s. 158 of the Act of 1894, although the order in which they occur is somewhat

(1) [1931] A. C. 126, 133.

altered. The words in s. 158, "by reason of the wreck or loss of the ship," become in s. 1 "by reason of the wreck or loss of a ship on which a seaman is employed." There is not, in my opinion, any room for doubt that whatever they mean, the words "wreck or loss" must mean the same in both sections. Nor, in my opinion, can your Lordships in the present case avoid attributing to the Legislature when it used in s. 1 of the Act of 1925 the identical words "wreck or loss" which had in 1913 been judicially construed by the Court of Appeal, and used them in reference to the same subject matter, an intention to use the words in the sense in which they had been so judicially construed. The authorities in support of a presumption of such intention are numerous and weighty. Some are referred to in the opinions of your Lordships and I need not repeat them. I may, however, call attention to two others. In *Barlow* v. *Teal* (1) Lord Coleridge C.J. said: "Where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts shewing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them." In this House Lord Loreburn, in giving his opinion in *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2), stated that "When an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense."

Is there anything in the Act of 1925 which would justify us in rebutting this presumption? For myself I find nothing, but I find much to compel us to act upon it. For, be it observed, full effect could have been given to the draft conventions by legislating strictly in the language thereof and adhering to the words "loss or foundering." Instead of following this course the Legislature has, as it appears to me, elected not to do so, but to legislate by reference to a section of an existing Act of Parliament the words of which

(1) (1885) 15 Q. B. D. 403, 405. (2) [1910] A. C. 116, 127.

by virtue of a judicial construction which had stood unchallenged for years, covered many occurrences other than loss or foundering. In these circumstances I feel bound to hold that the word "wreck" in s. 158 of the Act of 1925 bears the meaning attributed to it by the Court of Appeal in *The Olympic* (1) decision.

There remains the question whether the facts of this case bring it within that decision. Did that which happened to the ship render her incapable of carrying out the maritime adventure in respect of which the seaman's contract was made? Was the ship unseaworthy for so long a time as to frustrate that adventure? In my opinion the answer should be "No." The venture was a contract for a series of practically continuous fishing trips extending over a period of about six months. The ship was laid up for some fourteen days. While the accident to the ship no doubt caused an interruption of and an interference with the maritime adventure, I cannot hold that there was such an interruption or interference as to cause a frustration of that adventure. I agree with the judgments of Lord Blackburn and Lord Morison upon this point.

I think that the interlocutor should be affirmed and the appeal dismissed.

LORD MACMILLAN. My Lords, the Sheriff-Substitute in his findings of fact has furnished a full and accurate account of what befell the steam trawler *Strathclova* on September 25, 1930. It is not contested that by reason of the occurrence so described the service of the appellant, who was a seaman (in point of fact the chief engineer) employed on the *Strathclova*, was terminated before the date contemplated in his agreement with the respondents, the owners of the vessel. The question is whether in the circumstances his service can properly be said to have been terminated by reason of the "wreck" of the *Strathclova*, within the meaning of s. 1, sub-s. 1, of the Merchant Shipping (International Labour Conventions) Act, 1925, so as to give the appellant the benefit of that section.

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(1) [1913] P. 92.

Lord Macmillan.

The legislation under consideration is the most recent step in the progressive mitigation of the harsh rule of the common law that freight is the mother of wages, which deprived the seaman of any right to remuneration for his services unless the enterprise of maritime transport in which he was employed was duly completed. By s. 157, sub-s. 1, of the Merchant Shipping Act, 1894, it is roundly declared that "the right to wages shall not depend on the earning of freight," and in s. 158, where the seaman's service is prematurely terminated by reason of "the wreck or loss of the ship" he is given a right to his wages up to the time of such termination. Finally, by the section of the Act of 1925 now before your Lordships, the lot of the seaman whose service has suffered untimely termination "by reason of the wreck or loss" of his ship is further alleviated by entitling him to continue receiving his wages for a period of two months after such termination of his service, if he remains so long in fact unemployed.

My Lords, the question of the circumstances in which a seaman's service could properly be said to have been terminated by reason of the "wreck" of his vessel came before the Courts in the well known case of *The Olympic*. (1) It was there held by a majority of the Court of Appeal, affirming the judgment of Bargrave Deane J., that if the service of a seaman was terminated in consequence of a physical casualty befalling his ship, whereby she was rendered "incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into" (per Buckley L.J. (2)), then it could properly be said that the seaman's service had terminated by reason of the "wreck" of his ship within the statutory meaning. The criterion is thus seen to lie in the consequences of the casualty. "The frustration of the voyage," to quote Earl Loreburn L.C. in *Horlock* v. *Beal* (3), affords "a test by which to determine whether or not the physical injury inflicted amounted to 'wreck.'"

(1) [1913] P. 92.
(2) Ibid. 107.
(3) [1916] 1 A. C. 486, 493.

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In my opinion this interpretation has much to commend it. The word "wreck" is obviously a word of the most vague and general connotation. In the language of the literature of adventure, and possibly also for some legal purposes, it may well be that the wreck of a vessel means, as Kennedy L.J. said in his dissenting judgment in *The Olympic* (1), "such disaster caused by collision with some external object, be it stationary, such as a rock, or moving, as, e.g., another ship or some substance floating in the waves, as destroys her character as a ship, and reduces her practically to the condition which, speaking from memory, I think has been judicially described in the case of a wooden ship as a 'congeries of planks.'" But I do not think that it was intended that the enactment now under consideration should operate only on the occurrence of so dramatic and catastrophic a casualty. Suppose a ship at spring tide runs on a sand-bank in some remote part of the world and remains fast so that she cannot be refloated for a long period or at all and the crew are consequently discharged. I should hesitate to say that in such a case there had been no wreck of the vessel within the meaning of the Act, although she in fact remained intact. It is well to bear in mind what Buckley L.J. points out in *The Olympic* (2), that for the present purpose we have not "to inquire whether the ship was a wreck, that is to say, whether she had become a certain physical thing, but . . . . whether she had been so injured and damaged that she ceased to be a ship of service for the purposes of the adventure, the subject of the seaman's contract."

On the best consideration I have been able to give to the matter I have come to the conclusion that the view of the majority in *The Olympic* (3), which your Lordships are invited to overrule, was well founded and should be followed. In so holding I am not uninfluenced by the fact that the decision in *The Olympic* (3) was pronounced twenty years ago and until now has not been called in question. For this long period it has doubtless regulated the practice of ship-owners and marine insurers. Indeed, so far from being in

(1) [1913] P. 115.
(2) [1913] P. 106.
(3) [1913] P. 92.

Lord Macmillan.

any way questioned, the decision in *The Olympic* (1) was discussed and expounded in this House in the subsequent case of *Horlock* v. *Beal* (2) without any indication of disapproval but rather with every indication that the noble and learned Lords who referred to it accepted its doctrine as sound.

I am accordingly of opinion that, in deciding whether the occurrence which befell the *Strathclova* on the occasion in question brought the appellant's case within the operation of s. 1, sub-s. 1, of the Act of 1925, which in terms is merely an amending extension of s. 158 of the Act of 1894, the interpretation adopted in *The Olympic* (1) should be applied by your Lordships. I reach this conclusion without the necessity of invoking the rule of construction enunciated by James L.J. in *Ex parte Campbell* (3), upon which some of your Lordships have specially relied, though I am far from desiring to depreciate the value of the aid afforded by that rule in the interpretation of statutes. The principle of the rule is that where the language of a statute has received judicial interpretation, and Parliament again employs the same language in a subsequent statute dealing with the same subject matter, there is a presumption that Parliament intended that the language so used by it in the subsequent statute should be given the meaning which meantime has been judicially attributed to it. Parliament, in short, is to be presumed to have given statutory effect to the judicial interpretation so as to render it as binding on the Courts as if it had been expressly enacted in an interpretation section. If this rule were to be treated as a canon of construction of absolute obligation I can see that it might have very far-reaching and possibly undesirable consequences. I hope I am always ready and willing to obey the voice of Parliament and I fully recognize that, as Lord Esher once said, " The Legislature has the power to make you read English in a way in which you would not read it except by command " : *Stevens* v. *Bishop* (4)—the phrase does not occur in the report

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(1) [1913] P. 92.
(2) [1916] 1 A. C. 486.
(3) L. R. 5 Ch. 703, 706.
(4) (1888) 2 Tax Cas. 249, 254.

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in the Law Reports. (1) But I must be satisfied that it is the authentic voice and the authentic command of Parliament, and I find it rather a strain to have to believe that the reputed omniscience of Parliament extends to every decision of the Courts. What if the interpretative decision has never been reported? And what if Parliament has repeated language which has been construed in contrary senses by Courts of co-ordinate jurisdiction in England and Scotland? In my view the rule of interpretation which I am discussing affords only a valuable presumption as to the meaning of the language employed in a statute. Where a judicial interpretation is well settled and well recognized the rule ought doubtless to receive effect, but it must, I think, be a question of circumstances whether Parliament is to be presumed to have tacitly given statutory authority, say, to a single judgment of a competent Court so as to render that judgment, however obviously wrong, unexaminable in this House. After all, there is another rule of statutory interpretation of not less, if not indeed of higher authority, of which Parliament must be equally taken to be aware—namely, Lord Wensleydale's "golden rule" (2) that in construing statutes the grammatical and ordinary sense of the words is to be adhered to, unless it leads to some absurdity, repugnance or inconsistency. For myself, I prefer the later form in which James L.J. himself restated his rule in the case of *Greaves* v. *Tofield* (3) as follows: "If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature when using well-known words upon which there have been well-known decisions uses those words in the sense which the decisions have attached to them." To the rule as so stated I am prepared wholeheartedly to subscribe.

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(1) (1888) 20 Q. B. D. 442.

(2) *Grey* v. *Pearson* (1857) 6 H. L. C. 61, 106; *Caledonian Ry. Co.* v. *North British Ry. Co.* (1881) 6 App. Cas. 114, 131.

(3) (1880) 14 Ch. D. 563, 571.

It now only remains to consider whether the particular circumstances of the casualty to the *Strathclova* entitle the appellant to say that his service was terminated by reason of the wreck of his ship, within the meaning attributed to that expression in *The Olympic.* (1) The appellant was on July 4, 1930, engaged to serve on board the *Strathclova*, "which is to be employed Fishing Trawl North Sea, Shetland, West Coast and Faroe until the last day of December," 1930. When so employed the vessel was regularly engaged in plying her trade on the fishing grounds, returning to port from time to time to discharge her catch and then putting to sea again after a day or two occupied in unloading, bunkering and other ordinary incidents. In consequence of the casualty of September 25, 1930, the vessel had to be laid off work for a fortnight and placed in dry-dock, where repairs costing 265*l.* were effected, the crew, including the appellant, having meantime been paid off. In my opinion the fact that for this relatively short period of time the vessel was off work in consequence of the casualty which had befallen her, did not render her "incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into," so as to entitle the appellant to claim that the premature termination of his service was by reason of the wreck of his ship within the statutory meaning.

I am accordingly of opinion that the interlocutor appealed from should be affirmed and the appeal dismissed with costs.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed.

Lords' Journals, March 17, 1933.

Agents for appellant: *Sharpe, Pritchard & Co., for Milne & Reid, Advocates, Aberdeen, and James Mackenzie, Solicitor, Edinburgh.*

Agents for respondents: *Pritchard & Sons, for James & George Collie, Aberdeen, and Alex. Morison & Co., W.S., Edinburgh.*

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(1) [1913] P. 92.

[HOUSE OF LORDS.]

OWNERS OF DREDGER LIESBOSCH . APPELLANTS ;

AND

OWNERS OF STEAMSHIP EDISON . . RESPONDENTS.

H. L. (E.)*
1933
Feb. 28.

Shipping—Collision—Assessment of Damages—Objection to Registrar's Report—Dredger engaged on Constructional Work—Total Loss—Contract with Harbour Authority—Substituted Dredger hired—Expense increased through Want of Funds—Delay in executing Work.

While the dredger *Liesbosch* was lying moored alongside the breakwater at Patras Harbour in the Hellenic Republic the steamship *Edison* fouled the dredger's moorings and carried her out to sea, where she sank and was lost. The owners of the *Edison* admitted sole liability for the loss. In proceedings before the Admiralty Registrar and a Merchant between the owners of the *Liesbosch* and the owners of the *Edison* to assess the damages it appeared that the *Liesbosch* had been bought in 1927 for 4000*l.* by her owners, who had spent a further 2000*l.* in bringing her to Patras. They were a syndicate of civil engineers. Under a contract with the Patras Harbour Commissioners they were engaged in constructive work in the harbour, for which a dredger was necessary and for which they were using the *Liesbosch.*

The contract provided for completion of the work within a specified time. Delay in completion involved payment of heavy penalties and, if prolonged, cancellation of the contract. The owners of the *Liesbosch* had staked their capital and credit on the successful result of the contract. The loss of the *Liesbosch* stopped the work and, being unable from want of funds to purchase any suitable dredger which was for sale, on May 4, 1929, they hired a dredger, the *Adria,* which was lying in harbour at Carlo Forte, Sardinia, to take the place of the *Liesbosch.* The *Adria* was more expensive in working than the *Liesbosch,* and required the attendance of a tug and two hopper barges.

The *Liesbosch* was sunk on November 26, 1928. The *Adria* got to work on the harbour on June 17, 1929. On June 30, 1930, the Harbour Commissioners bought the *Adria* from her Italian owners for 9177*l.* and on September 5, 1930, they resold her to the owners of the *Liesbosch* for the same sum payable in instalments :—

Held, that the measure of damages was the value of the *Liesbosch* to her owners as a profit-earning dredger at the time and place of her loss ; and that it should include :—

(1.) A capital sum made up of (*a*) the market price on November 26, 1928, of a dredger comparable to the *Liesbosch* ; (*b*) the cost of adapting the new dredger and of transporting and insuring her from her moorings to Patras; and (*c*) compensation for disturbance and loss suffered by the owners of the *Liesbosch* in carrying out their contract during the period between November 26, 1928, and the date on which the substituted dredger could reasonably have been available for use at Patras, including in that loss such items as overhead charges and expenses of staff and equipment and the like thrown away, but neglecting any special loss or extra expense due to the financial position of one or other of the parties.

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* *Present :* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(2.) Interest upon that capital sum from November 26, 1928.

The rule in *The Columbus* (1849) 3 W. Rob. 158 disapproved where a vessel was in profitable employment at the time of her loss.

Dictum of Lord Collins in *Clippens Oil Co.* v. *Edinburgh and District Water Trustees* [1907] A. C. 291, 303, not approved.

Order of the Court of Appeal [1932] P. 52 varied.

APPEAL from an order of the Court of Appeal (1) varying an order of Langton J. (2) who affirmed the report of the Registrar of the Admiralty Division of the High Court assessing the amount of damages payable by the owners of the steamer *Edison* as solely to blame for the sinking of the plaintiffs' dredger, the *Liesbosch.*

The facts are stated in detail in the speech of Lord Wright. The headnote contains a summary to which the following account of the proceedings in the Courts below may usefully be added.

On the inquiry with a view to the assessment of damages the Registrar was of opinion that the plaintiffs, in the emergency and in view of the severe terms imposed upon them by their contract and their want of liquid resources, had taken a reasonable course in hiring the *Adria* to enable them to complete the work with as little delay as possible, and that the steps they took were the direct and natural consequences of the defendants' wrongful act. He therefore allowed the plaintiffs :—

1. The actual value to them of the *Liesbosch*, which he estimated at 9177*l.*, the amount at which the Harbour Commissioners bought the *Adria* in June, 1930;

2. Reasonable expenses, such as rent and wages, from November 26, 1928, to June 16, 1929, while the work was stopped for want of a dredger;

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(1) [1932] P. 52.

(2) [1931] P. 230.

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3. Expenses of hiring the *Adria* from May 4, 1929, to June 30, 1930, when the Harbour Commissioners purchased her;

4. Extra cost of working the *Adria* compared with that of working the *Liesbosch*;

5. Loss of profit on the contract between November 26, 1928, and June 16, 1929.

He assessed the total amount of damages at 19,820*l.* 12*s.* 7*d.* The defendants by motion objected to the report of the Registrar. The motion was heard by Langton J., and that learned judge affirmed the principle on which the Registrar had arrived at his assessment. (1)

On the defendants' appeal to the Court of Appeal that Court (Scrutton, Greer and Slesser L.JJ.) reversed the order of Langton J. (2) and held that the plaintiffs could recover no more than the value of the *Liesbosch* as a going concern at the time and place of her loss (which the Court in round numbers estimated at 9000*l.*) with interest thereon at 5 per cent. to the date of judgment; and that any loss which the plaintiffs sustained through being hampered and hindered in the performance of their contract with the Harbour Commissioners was too remote and could not be recovered.

The owners of the *Liesbosch* appealed.

1933. Jan. 26. *Raeburn K.C.* and *Lewis Noad K.C.* for the appellants. The Court of Appeal have laid down the wrong measure of damage, and the judgment of Langton J. ought to be restored. It is well settled that the same principle governs the assessment of damages in a collision action in the Admiralty Division as that which applies in an action in the King's Bench Division for destroying or converting a chattel: *The Argentino* (3); *The Susquehanna* (4), per Lord Dunedin. The damages which flow reasonably and naturally from the wrongful act are recoverable. ✓ And the main question in this case is whether the hiring of the *Adria* by the appellants was a reasonable and natural result of the loss of the *Liesbosch*. In so far as this is a question of fact it has been answered in favour of the appellants both by the Registrar and by the learned judge, and the answer ought to have been accepted as final by the Court of Appeal. It can hardly be denied that the question whether the hiring was a reasonable act in the circumstances is a question of fact. There remains the question whether it was a natural act in the circumstances, and the answer seems to depend upon whether the financial position of the appellants was one of the circumstances which might properly be taken into account. The answer to this question decides the present appeal.

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(1) [1931] P. 230.
(2) [1932] P. 52.
(3) (1888) 13 P. D. 191; (1889) 14 App. Cas. 519.
(4) [1926] A. C. 655, 661.

One of the parties has to suffer the result of the appellants' want of funds; either the wrongdoers or their victims. It is submitted that the wrongdoers are the proper persons to bear the misfortune. Just as a wrongdoer committing a trespass to the person may have to pay heavier damages where the plaintiff suffers originally from weak health than he would have to pay if the plaintiff was robust and vigorous by nature (1)—and negligently injuring a person in the street is only a form of trespass: *Holmes* v. *Mather* (2)—so a wrongdoer committing trespass to goods should be answerable if the owner of the goods through want of funds has to submit to stringent terms in order to replace his loss. In either case "the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act": *Clippens Oil Co.* v. *Edinburgh and District Water Trustees* (3), per Lord Collins; *Clyde Navigation Trustees* v. *Bowring Steamship Co.* (4) As the law will lay down no standard of health so it will lay down no standard of affluence for those who engage in business. If a firm, syndicate, or company may

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(1) See *Linklater* v. *Minister of Railways* (1901) 18 New Zealand L. R. 536; Beven on Negligence, 4th ed. (1928), p. 103.

(2) (1875) L. R. 10 Ex. 261.

(3) [1907] A. C. 291, 303.

(4) (1929) 34 Ll. L. Rep. 319.

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not engage in an adventure without first accumulating funds which will suffice to meet all emergencies, there would be but little encouragement for enterprise. It is contended that the victim of a wrong is "bound to take all reasonable steps to mitigate the damages," a misleading phrase in much favour with defendants, but really meaning no more than that the plaintiff can only recover such damages as reasonably flow from the wrongful act. In so far as the words imply more than that, they leave the domain of law and stray into the region of ethics. "The object of that principle is to prevent a tort-sufferer from recovering for damage, which is really self-inflicted, because with reasonable effort he could have avoided it. This does not extend to investing the tortfeasor with a right to call on him to do things which do not follow from the collision, in order to diminish liability for the wrong": *Admiralty Commissioners* v. *S.S. Chekiang* (*Owners*) (1), per Lord Sumner. The principle, such as it is, has been shorn of some of its pretensions in *James Finlay & Co.* v. *N. V. Kwik Hoo Tong H. M.* (2) There was no duty upon the appellants to be supplied with liquid assets sufficient to enable them to purchase a dredger to replace the *Liesbosch* in case some one should negligently run into and sink her. In the circumstances they did what was reasonable and the only thing they were able to do, in hiring the *Adria*, and are entitled to the five heads of damages allowed by the Registrar and by Langton J.

Secondly, the Court of Appeal has held that the appellants can recover nothing but the value of the *Liesbosch* to them and interest at 5 per cent. on that sum. The value is taken at 9177*l.*, which was in fact the amount for which the Harbour Commissioners bought the *Adria* in June, 1930. The actual value of the *Liesbosch* seems to have been some 3000*l.* less than that. It is not clear whether the expense of bringing the *Adria* from Sardinia to Patras is covered by this 3000*l.* But it is clear that it does not include anything for the period between November 26, 1928, and June 17, 1929, during which the work on the harbour was interrupted

(1) [1926] A. C. 637, 646.

(2) [1929] 1 K. B. 400.

and expenses continued to be incurred. The Court have held that the contract with the Harbour Commissioners is a special and exceptional matter which cannot be taken into consideration in assessing the damages, but it is submitted on the analogy of *The Kate* (1); *The Racine* (2); and *The Philadelphia* (3), that this was not the correct view to take, inasmuch as the *Liesbosch* was actually in use at the time of her loss and there was nothing speculative or special in the user.

Jan. 27. *Dickinson K.C.* and *G. H. Main Thompson* for the respondents. The order of the Court of Appeal is right and should be affirmed. The measure of damages for wrongful destruction of a chattel, whether it be a ship or "a serviceable threshing-machine," to use the words of Bowen L.J. in *The Argentino* (4), is the market price of the chattel at the date of the loss and interest on that sum till payment. If there is no market for chattels of the kind, then the value of the chattel to its owner is the principal sum: cf. *Borries* v. *Hutchinson.* (5) Here there was a market. The evidence showed that two or three dredgers of or about the dimensions and capacity of the *Liesbosch* were procurable from Holland. The appellants contend that they could not find the present means of purchasing one of these, and therefore that for them there was no market. In answer to that it may be admitted that if their want of means had been in any degree induced by the act of the respondents there might have been some force in this contention; but when the absence of ready cash was caused entirely by their own action, by what line of argument can they visit the respondents with the consequences?

But, assuming that there was no market for dredgers similar to the *Liesbosch*, in truth the order of the Court of Appeal has given the appellants the value of the dredger to them and interest on that principal sum. Scrutton L.J., quoting the words of Gorell Barnes J. in *The Harmonides* (6),

(1) [1899] P. 165.
(2) [1906] P. 273.
(3) [1917] P. 101.
(4) 13 P. D. 191, 201.
(5) (1865) 18 C. B. (N. S.) 445.
(6) [1903] P. 1, 6.

says (1): "The real test, where there is no market, is . . . . what is the value to the owners, as a going concern, at the time the vessel was sunk," and the Lord Justice continues in his own words: "I should add 'at that place,' for if the vessel had to be replaced at Patras, expense and time might have been added to the cost of the vessel replaced." Greer L.J. says (2): "The right way of estimating the damages in this case is that the tribunal should ascertain the value to the owner of his vessel at the date of the loss, taking into account that it is a tool of his trade ordinarily used for the purposes of profit, and taking into account, if such be the fact, the existing engagements of the owner with respect to the particular vessel, but excluding, to use the words of Bowen L.J. (3), 'everything in the nature of uncertain and speculative profits.'" Clearly therefore the Court must have been considering a substituted dredger in the port of Patras and the expense of bringing her there. The amount at which the Lords Justices have allowed the principal sum of 9177*l.* must have covered that expense. The *Liesbosch* herself was brought from Holland at the cost of 2000*l.* She cost 4000*l.* to buy. 9000*l.* must easily cover her value as a profit-earning dredger in the port of Patras.

More than that the appellants cannot have. They must themselves bear any inconvenience arising from delay in the works at Patras through loss of the *Liesbosch*: *The Columbus* (4); *The Clyde*. (5) The fact that a ship when totally lost was the subject of a profitable charterparty may be taken as evidence that she was a profit-earning chattel, but only so far. Loss of the profits of the charter as such cannot be recovered, because the charter has already spent its force in bearing witness to the value of the ship. So in this case the contract with the Harbour Commissioners has played its part in testifying to the value of the dredger, and the respondents cannot cite it again to prove that they have lost by being delayed in their performance of it. Damages

(1) [1932] P. 65.
(2) Ibid. 73.
(3) 13 P. D. 202.
(4) 3 W. Rob. 158.
(5) (1856) Sw. 23.

for being prevented from performing a particular contract are too special and remote to form an item of damage in an action for the loss of a vessel.

Raeburn K.C. in reply. *The Columbus* (1) has ceased to be a case of much authority: Roscoe, Measure of Damages in Actions of Maritime Collisions, 3rd ed. (1929), pp. 43 et seq.; especially the passage (p. 47): "The decisions which have established that in case of a total loss the plaintiff is entitled to recover the freight under a charterparty are to some extent destructive, so far as they are governing rules —of Dr. Lushington's dicta in *The Columbus.* (1) And as a charterparty is no more . . . . than convincing evidence of certain profits in the near future, it may be that the principle which is exemplified in *The Racine* (2) will one day be still further extended so as to include such loss of profits as can be clearly proved as reasonably certain to have been gained immediately after the collision, had the collision and the loss of the ship not occurred. On the other hand, the Court of Appeal in *The Philadelphia* (3) emphasized the rule laid down in *The Argentino* (4), that profits arising from an actual contract only could be claimed."

The House took time for consideration.

1933. Feb. 28. LORD TOMLIN. My Lords, my noble and learned friends, Lord Buckmaster and Lord Warrington of Clyffe, desire me to say that they concur in the opinion which has been prepared and is about to be read by my noble and learned friend, Lord Wright. I also concur in the same opinion.

LORD RUSSELL OF KILLOWEN. My Lords, I have the advantage of reading the judgment which has been prepared by my noble and learned friend, Lord Wright, and I also concur in it.

LORD WRIGHT. My Lords, on November 26, 1928, the respondents' steamship *Edison* in proceeding to sea from the

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(1) 3 W. Rob. 158.
(2) [1906] P. 273.
(3) [1917] P. 101.
(4) 13 P. D. 191.

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port of Patras fouled the moorings of the appellants' dredger *Liesbosch* and did not free them until she had carried the *Liesbosch* into the open sea, where the *Liesbosch*, being without crew on board, filled with water in the heavy sea which was running, sank and became a total loss. The appellants issued a writ in the Admiralty Division, and when the respondents admitted sole liability for the collision and loss (which they did not do until May 7, 1930) the claim was referred to the Registrar and Merchants to assess the damages.

The appellants, who are civil engineers, had entered into a contract dated March 4, 1927, with the Harbour Board of Patras for the construction under heavy penalties of piers and quay walls at Patras; the work involved among other things a considerable amount of dredging; for this work at the date of the accident the appellants were using the *Liesbosch*, which they had purchased in October, 1927, in Holland for 4000*l.*, to which must be added as part of the cost the sum of 2000*l.*, expended in fitting her out and transporting her to Patras. She was insured for 5520*l.*

There was evidence that in Holland there were available for purchase by the appellants in and about December, 1928, one or more dredgers by which the *Liesbosch* might have been replaced, but the appellants did not then take steps to purchase a dredger in substitution for the *Liesbosch*; all their liquid resources were engaged in the contract undertaking and in the deposit which under the contract they had made. In January, 1929, the Patras Harbour Authorities threatened to cancel the contract and forfeit the deposit unless the *Liesbosch* were replaced within a certain time. The appellants, owing to their financial embarrassments being unable to buy a dredger, decided to hire one in the Mediterranean, and on May 11, 1929, hired from Ancona in Italy a dredger called the *Adria*, at a high rate of hire. The *Adria* was somewhat larger than the *Liesbosch*, but more expensive to work, and in order to obtain her the appellants were compelled along with her also to take on hire a tug and two hopper barges.

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On June 17, 1929, the *Adria* and her attendant fleet arrived at Patras and commenced to work on the contract; until then work had been suspended since the date when the *Liesbosch* was lost, as the Harbour Board would not let the appellants do other work until dredging was resumed. The monthly rate of hire of the *Adria* proved so burdensome to the appellants that the Harbour Board, in order to help them, purchased the *Adria*, under a contract dated June 30, 1930, from the Italian owners, for a sum in cash and resold her to the appellants for the same sum, payable in forty-eight monthly instalments at 6 per cent. interest.

The amended claim of the appellants before the Registrar and Merchants was filed on November 14, 1930. It was presented in five parts which were as follows: Part 1 was for the price paid for the substituted *Adria*—namely, 9177*l*. 3*s*. 4*d*. and 882*l*. 7*s*. 2*d*. for expenses connected with the purchase. Part 2 was for 2922*l*. 1*s*. 2*d*. for overhead charges and interest on capital invested, as being thrown away during the period when work was stopped, that is from the date when the *Liesbosch* was lost until the *Adria* commenced work. Part 3 was for 6836*l*. 9*s*. 8*d*., being for hire paid for the *Adria* and her satellites from May 4, 1929, to July 3, 1930. Part 4 was for 1078*l*. 16*s*. 1*d*., being for the extra expense in working the *Adria* while on hire over what would have been the cost of working the *Liesbosch*. Part 5 was for 2353*l*. 10*s*. 3*d*. for profit alleged to have been lost owing to the stoppage of work under the contract between the date of the loss of the *Liesbosch* and the date when the *Adria* recommenced work.

On this claim the Registrar made his report on May 7, 1931. In substance he admitted the appellants' claim, though he reduced it from 23,514*l*. to 19,820*l*. He reduced certain items, and in particular under Part 5 he held that, as the appellants were able after the *Adria* arrived to resume the contract, there was no loss of profit during the period of delay, but merely a loss of interest, which he put at rather over 700*l*. The claim was put forward in drachmas, but I have taken the agreed rate of exchange. He made no

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finding as to the value of the *Liesbosch* at the date of the collision, but held in effect that: "having regard to all the existing circumstances, such as the severe terms of their contract in regard to penalties and their want of liquid resources" they had acted reasonably, and that the hiring of the *Adria* to complete an important contract with a public body was a direct and natural result of the collision. He did not in terms find that but for financial reasons the *Liesbosch* could have been replaced by purchasing an equivalent dredger, say in Holland, at a reasonable price and with little delay, but his finding that it was admitted by the appellants that they had not then the means to purchase a dredger does not contradict the evidence led by the respondents that there were in Holland at the date of the collision suitable dredgers for sale.

On objections being taken to the Registrar's report, Langton J., before whom the matter came, disallowed the respondents' objections that the damages claimed were too remote and confirmed the report, with a trifling variation. On appeal, the Court of Appeal allowed the appeal with costs, holding that the Registrar had proceeded on a wrong basis in allowing damages which were too remote in law, and ordered judgment to be entered for 9177*l.* 3*s.* 4*d.* with interest from November 26, 1928, to the date of their order at 5 per cent. From this order the matter comes before your Lordships' House.

The substantial issue is what in such a case as the present is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrongdoing vessel the owners of the former vessel are entitled to what is called restitutio in integrum, which means that they should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage.

The respondents contend that all that is recoverable as damages is the true value to the owners of the lost vessel as at the time and place of loss. Before considering what is involved in this contention, I think it desirable to examine the claim made by the appellants, which found favour with the Registrar and Langton J., and which in effect is that all their circumstances, in particular their want of means, must be taken into account and hence the damages must be based on their actual loss, provided only that, as the Registrar and the judge have found, they acted reasonably in the unfortunate predicament in which they were placed, even though but for their financial embarrassment they could have replaced the *Liesbosch* at a moderate price and with comparatively short delay. In my judgment the appellants are not entitled to recover damages on this basis. The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes," or consequences of consequences. Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants' financial embarrassment is to be regarded as a consequence of the respondents' tort, I think it is too remote, but I prefer to regard it as an independent cause, though its operative effect was conditioned by the loss of the dredger. The question of remoteness of damage has been considered in many authorities and from many aspects, but no case has

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been cited to your Lordships which would justify the appellants' claim. A dictum was quoted by Mr. Raeburn from the speech of Lord Collins in *Clippens Oil Co.* v. *Edinburgh and District Water Trustees* (1): "It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for in my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortious act." But, as I think it is clear that Lord Collins is here dealing not with measure of damage, but with the victim's duty to minimize damage, which is quite a different matter, the dictum is not in point. The case of *In re Polemis and Furness, Withy & Co.* (2), a case in tort of negligence, was cited as illustrating the wide scope possible in damages for tort; that case, however, was concerned with the immediate physical consequences of the negligent act, and not with the co-operation of an extraneous matter such as the plaintiff's want of means. I think, therefore, that it is not material further to consider that case here. Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic.

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(1) [1907] A. C. 291, 303.

(2) [1921] 3 K. B. 560.

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I agree with the conclusion of the Court of Appeal that the Registrar and Langton J. proceeded on a wrong basis and that the damages must be assessed as if the appellants had been able to go into the market and buy a dredger to replace the *Liesbosch*. On that basis it is necessary to decide between the conflicting views put forward, on the one hand by the respondents, that all that is recoverable is the market price of the dredger, together with cost of transport to Patras and interest, and on the other hand by the appellants that they are also entitled to damages in addition for loss during the period of inevitable delay before the substituted dredger could arrive and start work at Patras. The respondents in support of their contention relied on *The Columbus* (1), in which Dr. Lushington refused in respect of a fishing vessel any compensation save on the basis of the smack's market value with interest; he gave as an illustration of the same principle the case of an East Indiaman with a valuable freight on board sunk in collision by a wrongdoing vessel; in that case, as in the case of the humble fishing vessel, the compensation would in his opinion be thus limited. He said: "The true rule of law in such a case would, I conceive, be this, viz., to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners, as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit in its application to the difficulties which would be imposed upon the Court. It would extend to almost endless ramifications and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision."

But, for all the eminence of Dr. Lushington, the simple but arbitrary rule he thus enunciated has not prevailed at least as regards ships under profitable freight engagement.

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(1) 3 W. Rob. 158, 164.

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Perhaps it was felt that, in the words afterwards used by Lord Sumner in *Admiralty Commissioners* v. *S.S. Chekiang (Owners)* (1): "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject." Lord Sumner also distinguishes "a rule of thumb" from what is binding law. In these cases the dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule. A view of the practice of the Admiralty Court differing from that of Dr. Lushington was stated by Sir Robert Phillimore in *The Northumbria* (2), and in *The Kate* (3) it was expressly held that in the case of a vessel being totally lost by collision, while on her way in ballast to load under a charter, the proper measure of damages against the vessel solely liable for the collision was the value of the vessel at the end of her voyage, plus the profits lost under the charterparty. The same principle was extended in *The Racine* (4) to a vessel sunk while on her voyage under charter from her home port to a foreign port, from which port she was chartered to proceed to another port, from which again she was chartered back to her home port; it was held that the owner was entitled to recover the presumed net loss of freight on all three charters less 10 per cent. for contingencies and her value on her return to the home port at the end of the three charters. But in *The Philadelphia* (5) it was decided that the value must be determined as at the time of the loss (the market had in that case risen between the date of the loss and the presumed date of her arrival at the end of the voyage) together with the proper net sum in respect of her existing charters, subject to allowance for contingencies. It is now clear, accordingly, that the arbitrary rule suggested by Dr. Lushington is not law, though the decisions just cited, however just in the result, cannot be regarded as logical or complete. The true rule seems to be that the

(1) [1926] A. C. 637, 643.
(2) (1869) L. R. 3 A. & E. 6.
(3) [1899] P. 165.
(4) [1906] P. 273.
(5) [1917] P. 101.

measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing that value regard must naturally be had to her pending engagements, either profitable or the reverse. The rule, however, obviously requires some care in its application; the figure of damage is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances. The value of prospective freights cannot simply be added to the market value but ought to be taken into account in order to ascertain the total value for purpose of assessing the damage, since if it is merely added to the market value of a free ship, the owner will be getting pro tanto his damages twice over. The vessel cannot be earning in the open market, while fulfilling the pending charter or charters. Again, the present valuation of a future charter becomes a matter of difficulty in the case even of successive charters, still more in the case of long charters, such for instance as that in the *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1), which was for ten St. Lawrence seasons, with extension at the charterers' option for further eight seasons. The assessment of the value of such a vessel at the time of loss, with her engagements, may seem to present an extremely complicated and speculative problem. But different considerations apply to the simple case of a ship sunk by collision when free of all engagements, either being laid up in port or being a seeking ship in ballast, though intended for employment, if it can be obtained, under charter or otherwise. In such a case the fair measure of damage will be simply the market value, on which will be calculated interest at and from the date of loss, to compensate for delay in paying for the loss. But the contrasted cases of a tramp under charter or a seeking tramp do not exhaust all the possible problems in which must be sought an answer to the question what is involved in the principle of restitutio in integrum. I have only here mentioned such cases as a step to considering the problem in the present case. Many, varied and complex are

(1) [1926] A. C. 108.

the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula. A ship of war, a supply ship, a lightship, a dredger employed by a public authority, a passenger liner, a trawler, a cable ship, a tug boat (to take a few instances), all may raise quite different questions before their true value can be ascertained.

The question here under consideration is again different; the *Liesbosch* was not under charter nor intended to be chartered, but in fact was being employed by the owners in the normal course of their business as civil engineers, as an essential part of the plant they were using in performance of their contract at Patras. Just as in the other cases considered, so in this, what the Court has to ascertain is the real value to the owner as part of his working plant, ignoring remote considerations at the time of loss. If it had been possible without delay to replace a comparable dredger exactly as and where the *Liesbosch* was, at the market price, the appellants would have suffered no damage save the cost of doing so, that is in such an assumed case the market price, the position being analogous to that of the loss of goods for which there is a presently available market. But that is in this case a merely fanciful idea. Apart from any consideration of the appellants' lack of means, some substantial period was necessary to procure at Patras a substituted dredger; hence, I think, the appellants cannot be restored to their position before the accident unless they are compensated (if I may apply the words of Lord Herschell in *The Greta Holme* (1)), "in respect of the delay and prejudice caused to them in carrying out the works entrusted to them." He adds: "It is true these damages cannot be measured by any scale." Lord Herschell was there dealing with damages in the case of a dredger which was out of use during repairs, but in the present case I do not think the Court are any the more entitled to refuse, on the ground that there is difficulty in calculation, to consider as an element

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(1) [1897] A. C. 596, 605.

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in the value to the appellants of the dredger the delay and prejudice in which its loss involved them; nor is it enough to take the market value, that is, the purchase price (say, in Holland), even increased by the cost of transport, and add to that 5 per cent. interest as an arbitrary measure. It is true that the dredger was not named in the contract with the Patras Harbour authority, nor appropriated to it; but it was actually being used, and was intended to be used, by the appellants for the contract work. I am not clear if that view is what is meant by Scrutton L.J. in his judgment in this case, when he quotes the word of Gorell Barnes J. in *The Harmonides* (1): "The real test . . . . is . . . . what is the value" of the vessel "to the owners, as a going concern, at the time the vessel was sunk"; and the Lord Justice continues: "I should add, 'at that place,' for if the vessel had to be replaced at Patras, expense and time might have been added to the cost of the vessel replaced." In *The Harmonides* (1) Gorell Barnes J. had to consider in the case of an Atlantic passenger liner not her mere value in the general market, but her actual value to her owner in a business sense; he refused to confirm the Registrar's Report putting her value in the market at 18,000*l*., but heard fresh evidence and fixed the value at 31,000*l*. as being the real value to the owners. The problem there was in principle the same as the problem in this case. A nearer parallel is afforded by *Clyde Navigation Trustees* v. *Bowring Steamship Co.* (2), in which the Court of Session in Scotland, affirming Lord Morison, held that the pursuers, whose dredger had been rendered a total loss by the negligent navigation of the defenders' vessel, were entitled, if they were to be placed in the same position as if the injury had not been done them, to have a value placed on their dredger as the value to them, based on three elements: (1.) The cost of procuring a comparable dredger; (2.) cost of adapting it to their requirements; (3.) compensation for loss of user. The Court rejected the contention that there was any absolute rule fixing the compensation at the market value with interest from the date of the collision. The

(1) [1903] P. 16. (2) (1928) 32 Ll. L. Rep. 35; (1929) 34 Ll. L. Rep. 319.

late Mr. Registrar Roscoe, in his valuable work on "Measure of Damages in Maritime Collisions," cites at p. 42 of the 3rd ed. the case of *The Pacaure* (1), a lightship which was sunk in collision; the owners, the Mersey Docks and Harbour Board, were allowed, in addition to the value of the sunken vessel, the cost of a substituted vessel for 366 days. I should prefer to state that such extra cost was an element in assessing the loss of value to the owners of the lightship, though it may be no different result would follow from the difference in statement.

In my judgment similar principles are applicable to the present case; the difficulty in applying them is that the evidence called before, and the findings made by, the Registrar and Merchants were directed, as explained above, to a different measure of damage. Scrutton L.J. thus sums up the position (2): "But what the owners have lost is their dredger. If the Court gives them the value of their dredger at the time and place of the loss as a profit-earning dredger, and gives them interest on that value from the time of the loss till judgment, I do not see any room for a further award of profits"; and he goes on to describe the indirect losses which they claim in expense thrown away over the whole period during which they were without a dredger and the heavy outlay incurred in hiring and working the *Adria*, and for loss of profits. What Scrutton L.J. in fact awards as the value of the dredger to the appellants at the time and place of loss is 9177*l.*, which was what was paid for the *Adria* in September, 1930, but, as the Lord Justice points out, that fact is not evidence of the market value of the *Liesbosch* in November, 1928, when the *Liesbosch* was lost, any more than is the cost to them of the *Liesbosch* when they bought her, or the amount for which she was insured. It might seem to follow that Scrutton L.J. is intending to give some compensation, beyond the actual cost of replacing the *Liesbosch*, for delay and prejudice in the contract work; if not, I do not see how he is giving the value of the dredger to the owners at Patras as a factor in their business as a

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(1) (1912) Shipping Gazette (Dec., 1912).

(2) [1932] P. 67.

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going concern. It is on the true value so ascertained that the interest at 5 per cent. from the date of the collision will run, as further damages, on the principles of the Court of Admiralty stated by Sir Charles Butt in *The Kong Magnus* (1), that is, damages for the loss of the use of the money representing the lost vessel as from the date of the loss until payment. Mr. Raeburn has pressed that the matter should be sent back to the Registrar and Merchants for the amount of damages to be assessed on the principles accepted by this House. I have felt grave doubt about this, as I am not quite sure on what principle the Court of Appeal have arrived at the sum they have awarded. But the best opinion I can form is that they intended to give simply the replacement cost, without including in the value any allowance for disturbance and prejudice during the necessary period of delay. If that is so, though I agree with their disallowance of the claim as put forward, I do not agree with the disallowance, in ascertaining the value, of anything beyond the cost of replacement. I do not think in a case like this interest is a compensation for that factor, because I think that factor must be something to be taken into account in arriving at the figure of value on which interest must run. On the whole I think Mr. Raeburn is right in urging that the matter should be referred back to the Registrar and Merchants to ascertain the true value on the principles I have stated. From these it follows that the value of the *Liesbosch* to the appellants, capitalized as at the date of the loss, must be assessed by taking into account: (1.) the market price of a comparable dredger in substitution; (2.) costs of adaptation, transport, insurance, etc., to Patras; (3.) compensation for disturbance and loss in carrying out their contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in Patras, including in that loss such items as overhead charges, expenses of staff and equipment, and so forth thrown away, but neglecting any special loss due to the appellants' financial position. On the capitalized sum so assessed, interest will run from the date of the loss.

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(1) [1891] P. 223.

The result is that the appellants have substantially failed in the appeal, because they have failed in their claim that the judgment of Langton J. should be restored, and accordingly they should pay to the respondents three-quarters of their costs of this appeal. The order of the Court of Appeal will be varied by substituting for the judgment for 9177*l*. 3*s*. 4*d*. a judgment for such sum as the Registrar and Merchants may find on reference back to them. Save as so varied the order of the Court of Appeal will stand. I cannot help expressing a hope that the parties may now compose this remaining difference without further proceeding in the Registry.

Order of the Court of Appeal varied by substituting for the judgment for 9177*l*. 3*s*. 4*d*. *a judgment for such sum as the Admiralty Registrar may find on reference back to him; subject to such variation the said order affirmed. Cause remitted to the Registrar with a direction to assess the true measure of damage on the principles laid down by this House. The appellants to pay to the respondents three-quarters of the costs incurred by them in respect of the said appeal.*

Lords' Journals, February 28, 1933.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1933
Feb. 2.

ARCOS, LIMITED . . . . APPELLANTS;

AND

E. A. RONAASEN AND SON . . . . RESPONDENTS.

Sale of Goods—Timber Contract—Staves of a specified Thickness—Goods commercially within and merchantable under Contract Specification—Right to reject—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 13.

Agents for the sale of Russian timber agreed to sell to English buyers a quantity of staves of Russian redwood and whitewood, required by the buyers, as the sellers knew, for making cement barrels. The price was to include cost, freight and insurance from Archangel to the River Thames. With respect to the length, breadth, and thickness the agreement contained stipulations which allowed some variation in the length and in the breadth of the staves, but none in the thickness, which in all cases was specified as half an inch. When the goods arrived in London the buyers claimed to reject them on the ground that they did not conform to the description in the contract in that they were not of the thickness of half an inch.

In an arbitration under the contract an umpire made an award in the form of a special case for the opinion of the King's Bench Division, in which he found that in thickness none of the staves were less than half an inch; about 5 per cent. were half an inch; a large proportion was over half an inch, but not more than $\frac{9}{16}$ of an inch; some were over $\frac{9}{16}$ of an inch; a very small proportion was over $\frac{5}{8}$ of an inch. The umpire found that the staves were fit for making cement barrels and that when shipped they were commercially within and merchantable under the specification in the contract:—

Held (affirming the decision of the Court of Appeal and that of the learned judge of the King's Bench Division), that the buyers were entitled to demand goods answering the description in the contract, and were not bound to accept the goods tendered merely because they were merchantable under that description.

Vigers Bros. v. *Sanderson Bros.* [1901] 1 K. B. 608 distinguished.

APPEAL from an order of the Court of Appeal affirming an order of Wright J. upon an award of an umpire in the form of a special case stated under s. 7 of the Arbitration Act, 1889.

The facts, which are summarized in the headnote, are fully stated in the speeches of Lord Buckmaster and Lord Atkin. The question was whether in the circumstances the buyers, the respondents, were within their rights in rejecting the goods. The umpire made his award in favour of the sellers, subject to the opinion of the Court upon the special case stated by him.

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* *Present:* LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD MACMILLAN.

On the hearing of the special case Wright J. held that the buyers were entitled to reject the goods. The Court of Appeal (Scrutton, Greer and Slesser L.JJ.) affirmed the decision of Wright J.

The sellers appealed.

1932. Nov. 29. *van den Berg K.C.* and *Gordon Alchin* for the appellants.

Le Quesne K.C. and *W. Arthian Davies* for the respondents were not called on.

The House took time for consideration.

1933. Feb. 2. LORD BUCKMASTER. My Lords, the appellants are an English company, and are the instruments of the Russian Government for the sale of their goods in this country. By two contracts, dated November 13, 1929, they agreed to sell to the respondents a quantity of redwood and whitewood staves c.i.f. the River Thames. The staves were to be shipped during the summer of 1930, and were to be of the following dimensions: under one contract as to 90 standards they were to be of ½ inch thickness, 28 inches in length, and 2 inches to 5 inches in breadth; and as to 10 standards, ½ inch thickness, 17 inches in length, and 2½ inches to 5 inches in breadth; and under the other, 135/180 standards were to be ½ inch by 28 inches by 2 inches to 5 inches; 15/20, ½ inch by 17 inches by 2½ inches to 5 inches; 27, ½ inch by 28 inches by 2 inches to 5 inches; 3, ½ inch by 17 inches by 2½ inches to 5 inches. Each contract was in the same terms and provided that any dispute that should arise should be forthwith referred to the decision of a third party to be mutually agreed upon, or, in default, to two arbitrators.

The goods were shipped from Archangel on or about October 9, 1930. The buyers rejected the documents when tendered, on the ground that the shipment was not a shipment during the summer of 1930 in accordance with the terms of the contracts.

This matter was referred to arbitration, and the arbitrator, by his award dated February 18, 1931, awarded that the respondents were not entitled so to reject the goods. Since October, 1930, the goods which had been landed have lain exposed to the weather on the open wharf.

On April 10, 1931, the respondents demanded a further arbitration with regard to the quality and cutting of the staves. This was referred to two arbitrators, according to the contract, and they, having failed to agree, on July 3, 1931, appointed Mr. Vigers as umpire, who heard the evidence, inspected the goods, and made his award on August 24, 1931. It is with the meaning of the award upon the true facts there found that this appeal is concerned.

The real dispute was whether the goods satisfied the description as to measurement contained in the contracts, and upon this the umpire found as follows :—

"(2.) The goods tendered by the sellers to the buyers as aforesaid and invoiced as 28-inch staves (hereinafter referred to as 'the said 28-inch staves') were redwood and whitewood staves bundled and were in length not less than 28 inches and not more than 28⅛ inches.

(3.) The said 28-inch staves are of the following thicknesses :—

None are less than ½ inch.
4.3 per cent. are ½ inch.
85.3 per cent. are more than ½ inch and not more than 9/16 inch.
9.4 per cent. are more than 9/16 inch and not more than ⅝ inch.
1.0 per cent. are more than ⅝ inch and not more than ¾ inch.
None are over ¾ inch.

(4.) All the said 28-inch staves were 2 inches to 5 inches in width.

(5.) The goods tendered by the sellers to the buyers as aforesaid and invoiced as 17-inch staves (hereinafter referred to as 'the said 17-inch staves') were redwood and whitewood staves bundled and were in length not less than 17 inches and not more than 17⅛ inches.

(6.) The said 17-inch staves are of the following thicknesses :—

None are less than ½ inch.
6.4 per cent. are ½ inch.
75.3 per cent. are more than ½ inch and not more than 9/16 inch.
18.3 per cent. are more than 9/16 inch and not more than ⅝ inch.
None are over ⅝ inch.

(7.) With the exception of 2.159 standards 2 inches in width all the said 17-inch staves were 2½ inches to 5 inches in width. The tender of 2.159 standards of 17-inch staves 2 inches in width was within the provisions of the contracts referred to in para. 5 (ii.) of this award and constituted a good tender.

(12.) It was admitted by the buyers that some excess in thickness is permissible and I find that staves of thickness not exceeding ⅝ inch are fit for the purpose of making cement barrels whether as sides or headings.

(13.) The said 17-inch and 28-inch staves are now swollen and in bad condition by reason of wetting since shipment. I cannot say with accuracy from their present size what was their thickness when shipped but I find that their thickness was closer to ½ inch when shipped than it is now and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification."

Upon these findings the umpire held that the respondents were not entitled to reject the goods.

The award was in the form of a special case which came before Wright J. on December 15, 1931, who referred it back to the umpire to say what was the evidence upon which he based his statement as to the admission by the buyers that some excess in thickness was permitted. To which the umpire replied that that was his clear impression, but that his award was not based on that admission, and that the buyers had in fact received the very goods that the contract had provided.

Wright J. in his judgment decided in favour of the buyers, upon the ground that the difference in the sizes was not of such a trivial character as would justify its being disregarded by the Court; that the finding as to measurement showed that the goods were not those contracted to be sold and that it was those goods, and not their commercial equivalent, that the buyers were entitled to demand. The Court of Appeal have confirmed this view.

It is not necessary to examine again the actual difference between the goods shipped and those defined in the specification; nor is it possible to fix the exact extent to which the exposure of the staves, for which the respondents were responsible, has altered their size. For the real question is whether the statement of the umpire that the staves, when shipped, were commercially within and merchantable under the contract shows that he has found that according to its proper construction the contract has been satisfied. The very wording of the phrase leads strongly to the conclusion that it does not bear that interpretation.

The fact that the goods were merchantable under the contract is no test proper to be applied in determining whether the goods satisfied the contract description, and I think the phrase "commercially" itself shows that while the goods did not in fact answer the description, they could, as a matter of commerce, be so dealt with. But the rights of the buyers under the contract are not so limited. If the article they have purchased is not in fact the article that has been delivered, they are entitled to reject it, even though it is the commercial equivalent of that which they have bought.

But for the decision in the case of *Vigers Bros.* v. *Sanderson Bros.*(1) there could, I think, be little doubt about this matter. Bigham J. there held that the buyer was entitled to reject the goods, but he made a statement that the clause entitling the rejection does not operate "so as to force the buyer to

(1) [1901] 1 K. B. 608.

take the goods which are neither within nor about the specification, nor commercially within its meaning." That decision must be read in relation to the words of the contract then considered, which provided that the goods were to be "about" the specification stated. No such word as "about" occurs in the present contract.

There is no room in this contract for any elasticity, and I agree with the judgment of Scrutton L.J. in the case of *Green* v. *Arcos, Ld.* (1), that the phrase used by Bigham J. was only intended to cover cases in which the difference was so small that the law would not regard it.

The only part of this case that, in my opinion, presents any difficulty is the fact that some change of size took place owing to the exposure for which the respondents were responsible, but I agree with the interpretation of the Court of Appeal upon the finding in this respect—namely, that though the staves were nearer to ½ inch when they were delivered, yet they did not then satisfy the specification, except by regarding the matter as one in which the commercial equivalent can be accepted for the actual description.

I can find no flaw in the reasoning of Wright J. and the Court of Appeal, and their unanimous opinion renders further discussion of the matter unnecessary.

My Lords, I am asked to say that my Lord Blanesburgh and my Lord Macmillan agree with the opinion that I have expressed.

Lord Warrington of Clyffe. My Lords, the question in this appeal from a unanimous judgment of Scrutton, Greer and Slesser L.JJ. affirming a judgment of Wright J. in favour of the buyers, is whether on a sale of goods by description the implied condition that the goods shall correspond with the description (Sale of Goods Act, 1893, s. 13) has been performed by the seller so as to disentitle the buyer to reject the goods.

The facts and the law applicable to them have been or are about to be so thoroughly stated and discussed by other noble and learned Lords, whose opinions I have had the advantage of reading, that I propose to state quite shortly my reason for agreeing with their conclusion and that of the four learned judges by whom the case was decided in the Courts below.

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(1) (1931) 39 Ll. L. Rep. 229, 231.

The contracts (there were two in identical terms) were for the sale by the appellants as sellers to the respondents as buyers of a quantity of Russian redwood and whitewood staves of certain specified dimensions in length breadth and thickness. As to length and breadth certain limits of variation were permitted by the contract and are specified in the description, but as to thickness this is to be in every case ½ inch without any qualification.

The goods were duly shipped and tendered but they were rejected by the buyers on the only ground material to this appeal—namely, that they, or a large number of them, exceeded the contractual thickness and that the statutory condition was therefore not fulfilled.

Pursuant to the contracts the matter was referred to a commercial arbitrator, who made his award in the form of a special case.

Under the contracts the staves were to be of a definite thickness of ½ inch, neither more nor less, and with no qualification such as " about " or " substantially " or " commercially " whatever may be the precise meaning of this last word. The sellers therefore were bound to tender ½-inch staves. The actual results of the inspection of the staves given by the umpire disclosed extensive variations in thickness always on the side of excess. The staves had, however, been exposed to weather since landing and were swollen and in bad condition.

Under these circumstances the arbitrator stated " I cannot say with accuracy from their recent size what was their thickness when shipped but I find that their thickness was closer to ½ inch when shipped than it is now." That is in my opinion a finding that staves now exceeding ½ inch were at shipment also in excess of that measure though not to the same extent. He then adds : " I am satisfied

Lord Warrington of Clyffe.

that the staves when shipped were commercially within and merchantable under the contract specification," and he made an award in favour of the sellers.

In my opinion by acting as he did he has added to the description in the contract a qualification to which the contracting parties have not agreed, and which he was not entitled to add, and that the Courts below were justified in setting aside his award. It is not suggested that this is a case in which the deviations from the contractual thickness were so slight as to be negligible. In such a case a simple finding that they answered the description would be proper without the addition of such a qualification as above mentioned.

I agree that the appeal fails and should be dismissed with costs.

Lord Atkin (read by Lord Russell of Killowen). My Lords, the question between the parties arises on an award stated in the form of a special case by an umpire appointed under a submission contained in two contracts for the sale of timber. The contracts were in the White Sea 1928 C.I.F. form and were between the appellants, Arcos, Ld., sellers, and the respondents, E. A. Ronaasen & Son, buyers.

It is unnecessary to set them out at length. The substance was that the sellers agreed to sell to the buyers "the wood goods hereinafter specified" subject to a variation of 20 per cent. in sellers' option on any item, to be shipped from Archangel "during the summer 1930." The first contract specified "Redwood and whitewood staves bundled :

90 standards ½ inch by 28 inches by 2 inches to 5 inches.
10 standards ½ inch by 17 inches by 2½ inches to 5 inches.

Messrs. Arcos, Ld., promise to do their best to induce the shippers not to cut any 2 inches in the ½ inch by 17 inches headings, but should a few 2 inches width fall buyers agree to take same at a reduction in price of 40*s*. per standard." There were further conditions on the back of the contract which it is unnecessary at present to consider.

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The second contract was in identical terms save as to quantities of standards and provided for 135/180 and 27 standards of 28 inches length, and 15/20 and 3 standards of 17 inches length.

The staves were required by the buyers for making cement barrels, and this was made known to the sellers in circumstances that implied a condition that they should be fit for that purpose. The goods in question were shipped under the contracts in October. When the shipping documents were tendered the buyers refused them on the ground that there had not been a summer shipment. There was an arbitration to determine this dispute, and the umpire held that the shipment was a summer shipment.

The buyers thereupon examined the goods which had been landed and claimed to reject them on the ground that they were not of contract description. This dispute went to arbitration and the umpire made his award in the form of a special case in which, after stating the facts, he awarded subject to the opinion of the Court that the buyers were not entitled to reject. On the hearing of the special case Wright J., and on appeal the Court of Appeal, differed from the umpire and held that the buyers were entitled to reject. The simple question is whether the goods when shipped complied with the implied condition (see the Sale of Goods Act, 1893, s. 13) that they should correspond with the description.

When the umpire inspected them on July 9, 1931, some nine months after landing and exposure to rain, he found the actual measurements to be as follows:—

28-inch staves.
  None less than $\frac{1}{2}$ inch.
  4.3 per cent. were $\frac{1}{2}$ inch.
  85.3 per cent. between $\frac{1}{2}$ inch and $\frac{9}{16}$ inch.
  9.4 per cent. between $\frac{9}{16}$ inch and $\frac{5}{8}$ inch.
  1 per cent. between $\frac{5}{8}$ inch and $\frac{3}{4}$ inch.
  None over $\frac{3}{4}$ inch.
17-inch staves.
  None less than $\frac{1}{2}$ inch.

6.4 per cent. were $\frac{1}{2}$ inch.
75.3 per cent. between $\frac{1}{2}$ inch and $\frac{9}{16}$ inch.
18.3 per cent. between $\frac{9}{16}$ inch and $\frac{5}{8}$ inch.
None over $\frac{5}{8}$ inch.

He found that they were all fit for use in the manufacture of cement barrels. He was unable with accuracy to say what was their thickness when shipped, but, he stated, " their thickness was closer to $\frac{1}{2}$ inch than it is now and I am satisfied that the staves when shipped were commercially within and merchantable under the contract specification."

The decisions of the learned judge and of the Court of Appeal appear to me to have been unquestionably right. On the facts as stated by the umpire as of the time of inspection only about 5 per cent. of the goods corresponded with the description : and the umpire finds it impossible to say what proportion conformed at the time of shipment.

It was contended that in all commercial contracts the question was whether there was a " substantial " compliance with the contract : there always must be some margin : and it is for the tribunal of fact to determine whether the margin is exceeded or not. I cannot agree. If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does $\frac{1}{2}$ inch mean about $\frac{1}{2}$ inch. If the seller wants a margin he must and in my experience does stipulate for it. Of course by recognized trade usage particular figures may be given a different meaning, as in a baker's dozen ; or there may be even incorporated a definite margin more or less : but there is no evidence or finding of such a usage in the present case.

No doubt there may be microscopic deviations which business men and therefore lawyers will ignore. And in this respect it is necessary to remember that description and quantity are not necessarily the same : and that the legal rights in respect of them are regulated by different sections of the code, description by s. 13, quantity by s. 30.

It will be found that most of the cases that admit any deviation from the contract are cases where there has been an excess or deficiency in quantity which the Court has considered negligible. But apart from this consideration the right view is that the conditions of the contract must be strictly performed. If a condition is not performed the buyer has a right to reject. I do not myself think that there is any difference between business men and lawyers on this matter. No doubt, in business, men often find it unnecessary or inexpedient to insist on their strict legal rights. In a normal market if they get something substantially like the specified goods they may take them with or without grumbling and a claim for an allowance. But in a falling market I find that buyers are often as eager to insist on their legal rights as courts of law are ready to maintain them. No doubt at all times sellers are prepared to take a liberal view as to the rigidity of their own obligations, and possibly buyers who in turn are sellers may also dislike too much precision. But buyers are not, as far as my experience goes, inclined to think that the rights defined in the code are in excess of business needs.

It may be desirable to add that the result in this case is in no way affected by the umpire's finding that the goods were fit for the particular purpose for which they were required. The implied condition under s. 14, sub-s. 1, unless of course the contract provides otherwise, is additional to the condition under s. 13. A man may require goods for a particular purpose and make it known to the seller so as to secure the implied condition of fitness for that purpose: but there is no reason why he should not abandon that purpose if he pleases, and apply the goods to any purpose for which the description makes them suitable. If they do not correspond with the description there seems no business or legal reason why he should not reject them if he finds it convenient so to do.

Agreeing as I do with the reasoning of the judgments below, I find it unnecessary to say more than that I agree that the appeal should be dismissed with costs.

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Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 2, 1933.

Solicitors for appellants: *Wynne-Baxter & Keeble.*
Solicitors for respondents: *Nisbet, Drew & Loughborough.*

[HOUSE OF LORDS.]

H. L. (E.)*
1933
Jan. 30.

FALMOUTH DOCKS AND ENGINEERING COMPANY, LIMITED . . . APPELLANTS;

AND

TRELOAR . . . . RESPONDENT.

Workmen's Compensation—Accident arising out of and in Course of Employment—Dock Labourer—Heart Disease—Death while at Work—Stowing Bags of China Clay—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

A dock labourer left his home soon after 5 A.M. apparently in good health. Soon after reaching the docks where he was employed he felt unwell, but the attack passed off. At 6 A.M. he commenced work and was engaged with others in loading and unloading bags of china clay and of sugar, each weighing from 1 to 2 cwt., carried in slings to and from the ship. At 8.30 A.M. he had breakfast. He resumed work at 9 A.M. and was loading china clay. By piling the bags of clay one upon another he and his mates formed a temporary platform about 3 feet high, on which they received the slings. Each sling carried eleven bags, which the men stowed in convenient position on the ship. The deceased man was minded to move one of the bags on the platform. He was sitting on another bag at the time. He raised his hook above his head in order to lay hold of the bag he wished to shift. Then he fell forward and died.

The man suffered from heart disease, but the nature of the disease was uncertain. His panel doctor, who had died before the proceedings mentioned below, had given a certificate assigning the cause of death to myocarditis and syncope.

In proceedings under s. 1 of the Workmen's Compensation Act, 1925, by the widow and sole dependant of the deceased workman, the county court judge held that there was not sufficient evidence of an accident arising out of or in the course of the man's employment; for that any slight muscular movement might have caused his death at any time, and that there was nothing fortuitous about it:—

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

Held, affirming the decision of the Court of Appeal, that on the evidence it could not be doubted that the work the deceased man was doing contributed to his death; that when that was proved it established that the death was due to an accident arising out of and in the course of his employment, unless the contrary was shown, and that, in applying as the test the question whether the death was to be expected at any time, the county court judge had misdirected himself.

APPEAL from an order of the Court of Appeal reversing an award of the judge of the County Court of Cornwall holden at Falmouth and Truro, dismissing the claim of the widow and sole dependant of William Henry Treloar, deceased, a workman in the employment of the Falmouth Docks and Engineering Company, the appellants, who met his death on May 25, 1931, in the following circumstances:—

He was employed as a dock labourer. He left his home soon after 5 A.M. on May 25 apparently in good health. Soon after reaching Falmouth Docks he felt unwell for a short time, but the attack passed off and he commenced work on board a ship at about 6 A.M. and was in one of the holds, No. 3, with three other men, discharging bags of sugar and loading bags of china clay, each bag weighing from 1 to 2 cwt. The bags were carried or rolled to and from the slings, eleven bags going to one sling. Two men generally handled one bag. The deceased man worked till 8.30 A.M., and then had breakfast.

He resumed work at about 9 A.M. He and his mates began loading china clay in hold No. 2. One of the slings began to spin round. He tried to steady it with his hook but failed, and he had to let go the hook and caught one of his fingers between the bags.

Later he attempted to move one of the bags forming a temporary benching or platform which the men had made by piling bags one upon another in rows, and upon which they received each sling with its load of bags. The benching was about 3 feet high. Treloar was sitting upon a bag. He lifted his hook above his head to lay hold of the bag which he wished to move. Then he fell forward and died in a few minutes.

The man suffered from heart disease, but whether from myocarditis, or angina, or from aneurism of the aorta was not clear. There was no post-mortem examination. His panel doctor, who was dead at the time of the hearing in the county court, had given a certificate assigning the immediate cause of death to myocarditis and syncope.

The county court judge found that there was not sufficient evidence of an accident arising out of and in the course of the deceased man's employment; that his death might have been caused at any time by a slight muscular effort or by an attack of dyspepsia, and that there was nothing fortuitous about it. He held that, if the claim had been proved, the claimant would have been entitled to 255*l.* 5*s.* 4*d.*; but in the circumstances he gave his award in favour of the employers.

The claimant appealed. The Court of Appeal (Lord Hanworth M.R., and Slesser and Romer L.JJ.), following *Clover, Clayton & Co.* v. *Hughes* (1) and *McFarlane* v. *Hutton Brothers* (2), and distinguishing *Muscroft* v. *Stewarts & Lloyds, Ld.* (3), reversed the award of the county court judge and made an award in favour of the claimant.

The employers appealed.

Jan. 30. *Sir Walter Greaves-Lord K.C.* and *W. H. Duckworth* for the appellants.

W. Shakespeare and *J. Lhind Pratt* for the respondent.

At the conclusion of the argument for the appellants, counsel for the respondent being present but not called on, their Lordships delivered judgment as follows:—

LORD BUCKMASTER. My Lords, this is an appeal from the Court of Appeal, who set aside an award of the learned county court judge and awarded a sum of 255*l.* 5*s.* 4*d.* to the respondent, the widow of a workman who met his death in the appellants' service on May 25, 1931.

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(1) [1910] A. C. 242.

(2) (1926) 20 B. W. C. C. 222.

(3) (1928) 21 B. W. C. C. 274.

The circumstances attending the death of the respondent's husband are these: He was engaged in loading and discharging from a ship known as the *Highland Court* at the Falmouth Docks. He left his home at 5 o'clock in the morning, and his widow's evidence is that he was in a perfect state of health, so far as she could tell. He began work at 6 A.M. and he worked in a hold known as No. 3 hold in the ship. The business that he was engaged in doing there was chiefly that of discharging bags of sugar, but, in addition, they took on and loaded a certain number of bags of china clay. The china clay bags weighed from 1 to 2 cwt., and two men would lift them in cases where they were lifted, which was not universal, to a place about 3 to 4 feet up. There is evidence that this man was engaged in lifting two or three of these sacks. At 8.30 A.M. there was a halt for breakfast, and the work was said to have been resumed at 9 o'clock, though I can find no direct evidence pointing to that time—it is, however, immaterial. After the breakfast interval was past, work was resumed in No. 2 hold, where the men were engaged in receiving and packing large bags which were swung in by a crane. In the course of this work, while one of these loads of bags, weighing from 11 cwt. to 1 ton—it is impossible to say exactly what was its weight, because there were said to be eleven bags weighing from 1 to 2 cwt. each—is swinging in, it becomes the duty of the men to steady the load, and the evidence shows it requires three men for this work. This work in one instance this man undertook by himself; he caught hold of the swinging mass of matter, was pulled by it, but not pulled off his feet, because he let go. Three or four loads are then dealt with, and finally, as he is lifting his hook in order to move one of the bags, he falls down and dies.

Now, that the man had heart disease is not in dispute. What the form of heart disease was has never been made clear, because there never was a post-mortem examination. It might have been myocarditis; it might have been an aneurism; or it might have been angina; it is not quite clear which it was, but that he had one form or other of heart disease and died as the result of that disease that morning is beyond controversy. The question is whether the work which he was engaged upon brought about his death. In other words, if he had not been engaged on that work that morning, would he then have died ? That was the question which the learned county court judge had to answer.

My Lords, I must say it appears to me that the learned county court judge has misunderstood what he really had to do. He was not bound to find what particular form of heart disease the man died from, nor was it necessary for him to examine in detail the exact periods of time that elapsed between the time when the man had first caught hold of this swinging load and the time he died. Those things were really entirely unnecessary, because the doctor who gave evidence said in plain language that it was inconceivable that the work had no effect on the disease ; and there really was no effective evidence the other way. The original statement might be a little modified, but there is no doubt the medical evidence was all in agreement that the strain might produce his death if he suffered from either form of heart disease, subject only to this, that the doctors proceeded to measure the periods that might elapse between the result of the strain and death, according to the character of the disease. Now there is no evidence whatever that leads to the opinion that without the work this man was engaged on he, none the less, would have died of this disease. The learned county court judge appears to think that, as a man suffering from such affection might in cases of acute indigestion die as a result of the indigestion, this consideration cannot be eliminated. But there is no evidence that this man had an attack of indigestion that morning ; on the contrary, his wife said he left home perfectly well, and none of the workmen with whom he worked said that he complained of indigestion. There is no matter that I can see which justified the learned county court judge in considering that as a ground of death which it was essential for the plaintiff to exclude. Indeed, if that were necessary it is impossible to see how it could have been excluded, except by a post-mortem examination.

But there is something more in the judgment which I think is open to serious criticism. The man did in fact die when he was lifting his hand above his head to fasten his hook into a bag of china clay. It is accepted that a man suffering from heart disease does incur great peril if he lifts his hand above his head. The lifting of his hand after what had taken place might well have been the cause that ultimately either ruptured the artery or produced the special condition that immediately preceded death, but the learned county court judge says it is no more than a physical movement a man might make at any time, whether he was working or not, and there is nothing "fortuitous" about it. If he means that the lifting of his hand in the course of his work was the reason why the artery was ruptured and why death followed, yet because he might lift his hand when he was not working there was no accident and nothing fortuitous about it, I dissent entirely from that proposition. If a man is engaged in doing work, and as part of that work and in the course of it does something which he might do outside but which, none the less, happens in the course of and arising out of his work, and it causes his death, the accident has arisen out of and in the course of his employment. I put to counsel in the course of this case an illustration which appears to me perfectly sound: Supposing a workman is engaged in putting books on library shelves and he lifts the books, and in the course of lifting the books to put them on the library shelves, the action of lifting the books causes a strain upon his heart which his heart cannot bear, and he falls down dead, none the less the accident arises out of and in the course of his employment. I can see no reason why the learned county court judge should have disregarded this incident when, in fact, it followed that which, even without the evidence, everybody admits must have been a severe strain upon the man. The evidence is quite clear, that the man was engaged in work which was very heavy. He had actually been engaged on two operations where the strain must have been severe; and following upon that, when he tried to shift the last sack, the strain was too much and he fell down dead.

I see no reason to differ from the opinion of the Court of Appeal, nor do I see any reason to send this case again to the learned county court judge, because I think the judgment of the Court of Appeal should be accepted in all respects.

LORD WARRINGTON OF CLYFFE. My Lords, I entirely concur, and I only want to say a few words. I put my opinion upon two broad grounds. All we have to determine, or all the learned county court judge had to determine, is whether the work in which the man was engaged this morning contributed to his death. Now the man began work at 6 o'clock. He had worked on heavy work for two hours or two and a half hours, and the evidence is that at the end of that time, when they broke off for breakfast, he was suffering from a kind of faint; he said he felt queer, and one of his friends working with him said it was a kind of faint. They resumed work after breakfast and they continued work, some of it being heavy and some of it imposing a violent strain upon those who were doing it, until the man, after raising his hand with a view to doing some work with his hook, fell down and died. Now it is undisputed that the man suffered from heart disease. The doctor who attended him gives that as his diagnosis and he mentions the particular form of heart disease—namely, myocarditis. What the particular form was has not been definitely ascertained, but it does not matter. He suffered from a disease which was liable, under the stress of violent exertion, to cause death. In my opinion, the learned county court judge has misdirected himself in this particular, that he has examined only the two special incidents which were mentioned as taking place after breakfast. In my opinion, that is not enough: he ought to have considered the whole of the events of that morning, from the moment the man left home and went to his work, and what happened during the continuance of that work. If that is considered, then I think the true answer to the contention that we are here bound by the finding of fact is twofold. First that the learned judge misdirected himself in the way I have indicated, and, secondly, that there was no evidence capable of supporting a finding that the work the man did on this morning had not contributed to his death. The doctor who was called as a medical expert says: "It is inconceivable the work had no effect on the deceased. I think it was rather heavy work. If the deceased was suffering from heart disease the work would affect him." Here we find the man admittedly suffering from heart disease and the evidence, looked at as a whole, is, I think, that the work did affect him, as the doctor says, and brought about his death.

LORD TOMLIN. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, I am of opinion that the order made by the Court of Appeal in the present case was the correct order to make, and I desire to add nothing further.

LORD WRIGHT. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 30, 1932.

Solicitors for appellants: *Clifford-Turner, Hopton & Lawrence, for Nalder & Son, Truro.*

Solicitors for respondent: *Pattinson & Brewer, for Ratcliffe & Son, Falmouth.*

[HOUSE OF LORDS.]

H. L. (E.)*
1933
Feb. 2.

LONDON AND NORTH EASTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

BRENTNALL . . . . RESPONDENT.

Workmen's Compensation—Engine Driver—Hostel provided by Employers for Workmen—Accident in Hostel—"Accident arising out of and in course of Employment"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

An engine driver was employed by a railway company to drive a goods train from Woodford Halse, where he lived, to Sheffield and back again. On a day in April his train left Woodford Halse at 1.30 A.M. and reached Sheffield at 7 A.M. For about two hours he was occupied in shunting; then at 9.5 he entered his name at the locomotive shed at Sheffield as having finished his work for the time. His train was due to leave Sheffield for Woodford Halse at 7.40 P.M. on the same day. He was obliged to take eight hours' rest before starting, so he obtained at the locomotive shed a ticket for admission to the railway company's hostel, which consisted of two dwelling-houses some fifteen minutes' walk from the station yard. He was allowed a minimum sum of 3*s.* 6*d.* a day towards the expense of lodging, or 1*s.* a day less when the Company provided a hostel. It was the duty of the caretaker of the hostel to report to an official of the Company at the railway station if an engine driver lodging at the hostel had failed to take proper rest. He was not supposed to lodge elsewhere without leave; but, provided he took proper rest, he was free to occupy his time as he pleased.

He arrived at the hostel at 9.20 A.M. While walking down an asphalt slope, part of the premises, on his way to a lavatory, he slipped and fell and injured himself.

On the hearing of a claim by the man for compensation under s. 1 of the Workmen's Compensation Act, 1925, on the ground that he had received " personal injury by accident arising out of and in the course of [his] employment," the county court judge made an award in his favour, holding that, having obtained the ticket for admission to the hostel, it was his duty to lodge there. The railway company appealed. The Court of Appeal affirmed the decision of the county court judge. On the Company's appeal to the House of Lords:—

Held that, as the county court judge had held, it was part of the respondent's duty to go to the hostel for the purpose of obtaining rest, which was necessary for the proper performance of his work; that in

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

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accordance with the terms of his contract of service he was on the spot where the accident happened, and that the accident therefore arose out of and in the course of his employment.

St. Helens Colliery Co. v. *Hewitson* [1924] A. C. 59 distinguished.

Decision of the Court of Appeal affirmed.

Appeal from a decision of the Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) affirming an award of the judge of the County Court of Yorkshire holden at Sheffield in favour of a workman who claimed compensation for personal injury by accident alleged to have arisen out of and in the course of his employment within the meaning of s. 1 of the Workmen's Compensation Act, 1925.

The facts are stated in the headnote, and also in the speech of Lord Buckmaster.

Singleton K.C. and *G. J. Paull* for the appellants. The accident in this case did not arise " in the course of " the respondent's employment. He was employed to drive an engine from Woodford Halse to Sheffield and then, after an interval of ten hours, from Sheffield back to Woodford Halse. In the interval he was off duty; and the accident happened in the interval. It is true that it was his duty to rest for eight hours during that interval, but it was entirely at his own option when he chose to do this; and, it is submitted, that while he was resting he was not in the course of his employment within the meaning of s. 1 of the Workmen's Compensation Act, 1925.

But, assuming that while resting he could still be in the course of his employment, then the question is whether he was obliged or merely invited to use the hostel. This is the resultant effect of *John Stewart & Son* (1912), *Ld.* v. *Longhurst* (1); *Charles R. Davidson & Co.* v. *Officer* (2); *Armstrong, Whitworth & Co.* v. *Redford* (3), and *St. Helens Colliery Co.* v. *Hewitson* (4); and see especially per Lord Dunedin in *Armstrong, Whitworth & Co.* v. *Redford*. (5) The evidence falls short of establishing that any order was ever given by the appellants that their men should use the hostels.

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(1) [1917] A. C. 249.
(2) [1918] A. C. 304.
(3) [1920] A. C. 757.
(4) [1924] A. C. 59.
(5) [1920] A. C. 757, 773.

W. Shakespeare and *G. Raymond Hinchcliffe* appearing for the respondent, but not called on.

At the conclusion of the argument for the appellants their Lordships delivered judgment as follows:—

LORD BUCKMASTER. My Lords, this is an appeal from the Court of Appeal, who have affirmed an award made by the learned county court judge, sitting as an arbitrator, in a dispute between the London and North Eastern Railway Company and a man named James Herbert Brentnall, who was an engine driver in their service. The question is the old one arising under the Workmen's Compensation Act: Was Brentnall injured by reason of an accident that arose out of and in the course of his employment with the appellant Company?

Now the facts of the matter are these: the respondent was engaged by the appellants as an engine driver to drive an engine from Woodford Halse, where he lived, to Sheffield, and back again. He was under an obligation, as has been found by the learned county court judge, in the intervals between his journeys, to go and stay at a hostel which had been provided by the railway company at Sheffield for the use of their men. He was bound, not only to go there, but the learned county court judge finds as a fact that if, when he was there, he was not taking proper rest, it became the duty of the caretaker of the hostel to let the people in the locomotive shed know of the fact. Subject to this he was free to go where he pleased. On April 16, 1931, Brentnall left Woodford Halse, at 12.40 A.M., and took the 1.30 A.M. train to Sheffield. He reached Sheffield at seven in the morning. He booked off at five minutes past nine and walked to the hostel in Sheffield, which the appellants had provided, at a place called Wallace Road, about fifteen minutes' walk away from the station. After arriving at the hostel at 9.45, on his way to the lavatory he slipped and injured himself.

It is satisfactory to know that the injury was not serious, and the claim is merely for damages from April 16 to May 6. The amount involved is very small, but this House will no doubt accept the statement of the railway company that it is not the amount that is in dispute that has caused them to appeal this case, but their anxiety to secure some definite decision as to what is the true extent of their liability in such cases as the present. I am afraid it will be impossible to give them any ruling that will extend beyond the special facts and circumstances of this case. It is not, in my opinion, a prudent course to attempt in a case of this kind to lay down general principles which may, in the end, be said to apply to matters that were not within the contemplation of the judge who is attempting to enunciate the doctrine.

My Lords, in my opinion, this matter falls to be determined by a very simple consideration. This man, as part of his contract of service, was bound to go to this hostel —that is the clear conclusion of the learned county court judge—and he was bound to go to the hostel for a particular purpose—the purpose of obtaining rest; and indeed it was essential for the proper conduct of his work that he should have rest during the day, for he had to take the train back again at 7.40 at night from Sheffield to Woodford Halse. From the time that he left Woodford Halse in the morning certainly until the time when he returned at night, and for all I know for a longer period—but the actual contract of service is not before us—he was most certainly in the employment of the railway company, and, as part of the terms of his contract of service, on the spot where the accident occurred.

Now it is said that, none the less, the accident did not arise out of and in the course of his employment. That it arose out of his employment, upon the facts as I have stated them, seems to me indisputable. It was also in the course of his employment, if due weight is given to the circumstance, to which I have already referred—namely, that it was part of his employment that he should go to this place in order that he might obtain adequate rest between his two journeys.

My Lords, I have grave doubt whether the quotation of other cases is of great assistance in determining these matters, but it may at least be observed that in the case of the *St. Helens Colliery Co.* v. *Hewitson* (1) Lord Wrenbury made quite clear that there was all the difference between the thing which a man, by virtue of his contract of service, had the right to do and that which, by virtue of his contract of service, he was compelled to do. In that case a man had the advantage, by reason of his contract of service, of using a particular train to get to and from his work; while using that train an accident occurred, and it was held that the accident, occurring in the use of the train, was not one that arose out of and in the course of his employment, because he was free either to take the train or to leave it; but had he been bound to take the train there could have been no doubt as to what the conclusion of the House would have been. I find it very difficult indeed to distinguish between the case where a man is compelled to take a particular means of going to his work, and a case where a man is compelled to go to a particular place where he has to rest between the different spells of his work, and I cannot help thinking that, if authority were required, *Hewitson's* case (1) is abundant for the purpose.

My Lords, I do not think it profitable to examine the extent to which domestic servants might in one case or another be entitled to recover for injuries that arose while their term of service was on foot. It is wiser to confine each case to the particular circumstances in which it arises, and if I were asked to select a judgment in this case which most commended itself to my mind it would be the brief judgment of Romer L.J.

My Lords, in my opinion, this appeal fails and should be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

(1) [1924] A. C. 59.

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LORD TOMLIN. My Lords, I concur.

LORD RUSSELL OF KILLOWEN. My Lords, I concur.

LORD WRIGHT. My Lords, I also agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 2, 1933.

Solicitor for appellants: *I. B. Pritchard.*
Solicitors for respondent: *Pattinson & Brewer.*

[HOUSE OF LORDS.]

H. L. (E.)*
1933
Feb. 17.

ROSEN AND ANOTHER (PAUPERS) . . . APPELLANTS;

AND

OWNERS OF THE STEAMSHIP "QUERCUS" . . . . RESPONDENTS.

Workmen's Compensation—Ship in Port—Fireman permitted to sleep on Deck—Disappearance during Night—Body found in Water—Risk attached to Employment—Accident arising out of Employment—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

A fireman employed on a steamship, which at the time was moored to a quay in a Brazilian port, was permitted by the owners to sleep on deck under an awning in the forecastle head. There were bunks and lavatories for the men on the well-deck below. On the night of February 7, 1931, he went to sleep on the deck. There was no evidence that he was on duty during that night. On the following day his dead body was found in the water. There was no suggestion of suicide or foul play or that the man was drunk. His mother and sister claimed compensation under s. 1 of the Workmen's Compensation Act, 1925.

The county court judge made an award in favour of the shipowners, being of opinion that, in view of *Simpson* v. *London, Midland and Scottish Ry. Co.* [1931] A. C. 351, he could not infer from the facts that the accident arose out of the man's employment:—

Held, that this was a misdirection, and that the county court judge was free to draw his own conclusion upon the question.

Simpson v. *London, Midland and Scottish Ry. Co.* [1931] A. C. 351 explained and approved.

Decision of the Court of Appeal varied and case remitted to the county court.

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the County Court of Yorkshire holden at Kingston-upon-Hull dismissing the claim of the sister and mother dependants of George Oscar Rosen, lately a fireman on board the respondents' steamship *Quercus*, who met his death as hereinafter stated.

On the night of February 7, 1931, the ship was in the harbour of Porto Allegre, Brazil, moored to a quay and about 6 feet from it. The ship's rail consisted in part of two bars at the extreme edge of the deck. The upper bar was 3 feet 3 inches above the deck. The lower bar had been removed. In the space between the upper bar and the deck were two bollards 10 inches high, between which the mooring rope passed. Part of this rope was lying on the deck near the rail. In order to get through the rail it would have been necessary to climb over the upper bar.

The men were provided with bunks below, but they were allowed to sleep in the forecastle head about the windlass under an awning in a space about 30 feet in width.

On the night of February 7 the deceased man with his brother returned to the ship after an evening ashore. The night was warm and clear. At about 11 P.M. he went to the forecastle to sleep, taking his blanket with him. He was apparently asleep soon afterwards. There was no evidence that he was on duty at any time during the night. At 2.30 A.M. on February 8 the second officer heard a shout, and looked over the ship's side but could see nothing. At 3 A.M. the same officer reported to the master that the watchman thought he heard a splash and had seen a figure struggling in the water. One boot and a denture plate were found in the place where the deceased man had been sleeping. His body was recovered from the water at 1 P.M. He had a cut over one of his eyes. There was no suggestion of homicide or suicide, or that the man was not sober.

The master, the second officer, and the deceased man's brother thought that he must have gone to the ship's side to relieve himself and had fallen overboard. The lavatories for the crew were on the well-deck under the forecastle head deck.

To get to them the deceased man would have had to walk a few feet and go down a ladder to the well-deck.

The county court judge, after considering *Marshall* v. *Owners of S.S. Wild Rose* (1); *Swansea Vale (Owners)* v. *Rice* (2); *Lendrum* v. *Ayr Steam Shipping Co.* (3); and *Simpson* v. *London, Midland and Scottish Ry. Co.* (4), drew the inference that the deceased man was at the time of the accident "in the course of" his employment, but felt himself unable to infer that the accident arose "out of" the employment, inasmuch as the man was on the deck by his own volition and not in performance of any special duty to be there when the accident happened. He therefore gave his award in favour of the shipowners, the respondents.

The claimants appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) affirmed the award of the county court judge. From this decision the claimants appealed.

Hon. Sir Stafford Cripps K.C., *C. M. Picciotto*, *James R. Rea* and *Harold Lightman* for the appellants.

Sir Walter Greaves-Lord K.C. and *W. H. Owen* for the respondents.

At the conclusion of the arguments of counsel their Lordships gave judgment as follows :—

LORD BUCKMASTER. My Lords, this is an appeal from the Court of Appeal, who have affirmed an award made by the learned county court judge, sitting as arbitrator, in a case arising under the Workmen's Compensation Act. The circumstances of the case are these : One George Rosen was a fireman on board one of the respondents' ships, and some time in the early morning of February 8, 1931, he fell overboard. The exact circumstances which led to this accident have never been ascertained, but it was alleged by the present appellants, who are his partial dependants, that the accident arose out of and in the course of his employment.

(1) [1910] A. C. 486.
(2) [1912] A. C. 238.
(3) [1915] A. C. 217.
(4) [1931] A. C. 351.

The learned county court judge found against that claim, and his award has been confirmed, as I have already stated, by the Court of Appeal.

It is unnecessary to examine in detail what the evidence was in regard to this particular accident, because the learned county court judge has found—and upon these findings there can be no possibility of dispute—that the accident arose in the course of the deceased's employment, that he was not drunk, and that there was no suggestion of either suicide or homicide. The question left was whether the facts enabled the learned county court judge to draw the conclusion that the accident arose out of the man's employment, and this he found himself unable to do. If he had merely found that having considered the evidence the true inference was that this accident did not arise out of the employment of the deceased, I should have felt that it was impossible for this House to interfere; but, in my opinion, when the award is carefully examined it will be found that the learned county court judge has reached that conclusion by holding that in the circumstances he had no choice in the matter, but that he was bound to come to that conclusion as the necessary result of there being no evidence to show that the deceased man was at the spot where he fell overboard in the discharge of some duty which he owed to the owners of the ship. If that once be accepted as the true meaning of his award, I do not think that even counsel for the respondents would urge that the award could stand. But that is in my opinion the true result, and it is to be found by considering one or two of the statements made by the learned county court judge. He begins by referring to a statement of Lord Thankerton in the well known recent case of *Simpson* v. *London, Midland and Scottish Ry. Co.* (1), where a guard on a railway train, through an unknown cause, fell out of the train and was killed, in which he says: "The accident occurred at a place where the discharge of the duty of the deceased required him to be." That is, of course, perfectly true if the word "place" be regarded in this case as the ship, and in the case of the railway as the train, but if it is meant that when a man is on a train or on a ship and an accident occurs, it is necessary to establish some particular duty in the discharge of which he was at the particular spot where the accident happened, I think that is a misinterpretation of what the learned Lord meant, and is not in accordance with the decision. But, having quoted that, the learned county court judge continues: "These passages indicate the distinction that in the case where the dependants succeeded, it was proved that the deceased was on duty at the time of the accident, whereas where they failed the deceased was not so on duty," suggesting that there must be some active work which the deceased was engaged in discharging as part of his general employment. In other words, to be employed upon a ship, and then, owing to any accident associated with a ship, to lose your life would not be sufficient, unless it were shown that the particular accident was so connected with a particular duty which you were called upon to discharge that one was the necessary result of the other. This, I think, is made further plain by another statement that the learned county court judge makes later on, where he says: "I infer that the deceased in some manner disappeared overboard at some period after he retired to rest, between about 2.30 and 3.0 A.M. on the morning February 8, 1931. There is no evidence before me which can lead me to draw an inference as to how he went overboard, nor even from what part of the ship he went overboard. The evidence satisfies me that at the period of time in question, 2.30–3.0 A.M., he was not on duty." It appears to me that it was a wholly unnecessary thing for him to consider that, unless he thought that the fact of his being on duty was a critical and determining factor in the decision whether or not the accident arose out of his employment. Again he adds that he thinks the deceased's death was probably due to the act of relieving himself overboard at a time when he was not on duty; and he concludes by saying that there was no evidence to associate this man's duty with being at the side of the ship, and that the applicants must fail in their claim.

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(1) [1931] A. C. 351.

My Lords, in the Court of Appeal the matter really appeared to proceed more upon the question whether or not upon the evidence and upon the authorities the learned county court judge was entitled to draw the inference he did adverse to the applicants' claim, but the Master of the Rolls did deal with the other view of the matter in a passage in which he says: "Inasmuch as the man was not on duty during the night, that he came on deck to sleep of his own volition, is it possible as a matter of law to say that the learned county court judge ought to have directed himself that it was his employment or duty which brought him to be within the proximity of the peril to which his death was ascribed? I find it impossible to say that as a matter of law"; and "He must have been doing something which was not involved in or necessary to his sleeping on the deck and not involved in the duty, for at the time he was not operating in any duty." My Lords, I think that is a misunderstanding of the true position, which, I think, is laid down in clear terms in the opinion expressed by Lord Tomlin in the case of *Simpson* v. *London, Midland and Scottish Ry. Co.* (1), where he says this: "Where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches"—let me pause there to say that it is quite plain from the context that the learned Lord meant by "place" the railway train and not a particular spot in the railway train, as in this case it would mean the ship and not a particular spot on the ship—"and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to the immediate circumstances of the accident, to attribute the accident to that risk." "Legitimate" does not mean that it must be done; it means that it is open to the arbitrator to come to this conclusion if he, in his judgment, upon all the facts thinks right. Then my Lord Tomlin says (1): "But the inference as to the origin of the accident may be displaced by evidence tending to show that the accident was due to some action of the workman outside the scope of the employment."

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(1) [1931] A. C. 351, 369.

I think it might well be that the words "the inference" might be better expressed as "any inference," which I regard to be the true meaning of the passage, and it would then be: "Any inference, whatever it may be, as to the origin of the accident might be displaced by evidence tending to show otherwise." In other words, in such circumstances it is open to the arbitrator to find what is his inference from the facts as they are before him as to how the accident occurred, and in this particular case the fault I find with the award of the learned county court judge is that he does not seem to hold himself free to come to any such alternative decision, but bound to come only to one.

My Lords, for these reasons I think the judgment of the Court of Appeal should be reversed, and the matter should be sent back to the learned county court judge to be dealt with again. It is obviously undesirable that there should be an attempt to obtain further evidence—it may well be that some of the evidence could not now be obtained—and I imagine that counsel would raise no objection to the learned county court judge having this matter remitted to him with a direction that he is free to form what conclusion he thinks fit as to the true inference to be drawn from the facts, and that his opinion that he was not at liberty to form such opinion was erroneous.

My Lords, with that expression of opinion, and with a direction that such costs as are allowed in the case of a pauper appeal should be allowed to the appellants in this case, and the other costs should be dealt with as part of the final decision and included in the final award, I move that the judgment of the Court of Appeal be varied in the manner I have indicated.

LORD WARRINGTON OF CLYFFE. My Lords, I concur.

LORD TOMLIN. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I agree.

LORD WRIGHT. My Lords, I agree.

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Order of the Court of Appeal reversed: Cause remitted with a direction: Respondents to pay costs of appeal taxed in manner usual when appellant sues in forma pauperis.

Lords' Journals, Feb. 17, 1933.

Solicitors for appellants: *Peacock & Goddard, for Pearlman & Rosen, Hull.*

Solicitors for respondents: *Botterell & Roche, for Hearfield & Lambert, Hull.*

[HOUSE OF LORDS.]

H. L. (E.)*
1933
Feb. 3.

PARTRIDGE JONES AND JOHN PATON, LIMITED . . . . APPELLANTS;

AND

JAMES . . . . RESPONDENT.

Workmen's Compensation—Accident arising out of and in Course of Employment—Dipper in Ironworks—Heart Disease—Drosser in Galvanizing Department—Death after Work—Angina Pectoris—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.

An accident arises out of a workman's employment within the meaning of s. 1 of the Workmen's Compensation Act, 1925, when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of the workman's health. In each case the arbitrator adjudicating upon a claim for compensation must consider whether in substance, so far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it.

Clover, Clayton & Co. v. *Hughes* [1910] A. C. 242 followed.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal dismissing an appeal from an award of the judge of the County Court of Glamorganshire holden at Pontypridd in favour of the widow and dependant of Henry James, who met his death as hereinafter appearing. The claimant, who was the respondent in this appeal, claimed on behalf of herself and the three children aged ten years, seven years, and one year respectively, of the deceased man.

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

The appellants were the proprietors of Coal, Iron and Steel Works at Pontnewynydd in Monmouthshire. Henry James was a dipper in their employment. For some time before his death he had been suffering from disease of the coronary arteries, and his state was such that, although he might die at any time without any act of physical exertion, any such exertion was dangerous and likely to lead to heart failure. On October 11, 1930, he was engaged in the galvanizing department of the respondents' works. From the commencement of the shift in the morning up to 11.30 A.M. or soon afterwards he had been dipping sheets. It then became necessary to clean out the dross from the pot at which he had been working, and he proceeded to do this. It is part of the work of a dipper, but is a laborious operation and one which puts more strain upon a man than does the work of dipping sheets; but he went through with it, and then stopped work for a short time. He stepped down from the staging on which he had been working, and sat down on a swiller forming part of the plant. Within ten minutes of stopping work he died.

The result of the medical evidence was that the work the man had been doing accelerated his death, though the Company's witness gave it as his opinion that if the man had not worked on that day the prolongation of his life might have been by no more than an hour.

The county court judge found that the effect of the disease from which the workman suffered was that on October 11, 1930, the arteries failed to supply the amount of blood necessary for the heart to function when the man was doing his ordinary work in the ordinary way, and that this failure resulted in a condition known as angina pectoris and in failure of the heart. In these circumstances he considered himself bound by *McFarlane* v. *Hutton Brothers* (1) to hold that the man's death arose out of and in the course of his

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(1) (1926) 20 B. W. C. C. 222.

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employment, and made an award for 600*l.* in favour of the widow.

The employers appealed. The Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) affirmed the award of the county court judge. Hence this appeal.

Feb. 2. *Edgar Dale*, *H. H. Roskin* and *James MacMillan* for the appellants, contended that an accident did not arise out of and in the course of a man's employment if all that appeared was that suffering from a disease he died from the effects of the disease while at his work, but that in order to recover compensation a claimant must be able to point to some specific injury received in the course of the work.

[They cited *Stewart* v. *Wilsons and Clyde Coal Co.* (1); *Fenton* v. *Thorley & Co.* (2); *McFarlane* v. *Hutton Brothers* (3); *Cole* v. *London and North Eastern Ry. Co.* (4)]

E. W. Cave K.C. and *Godfrey Parsons* present on behalf of the respondent but not called on.

Feb. 3. At the conclusion of the argument for the appellants their Lordships delivered judgment as follows:—

LORD BUCKMASTER. My Lords, the question in this case is whether or not the appellants are liable under the Workmen's Compensation Act to make compensation to the respondent, the widow of a man who died in their service on October 11, 1930, in circumstances that I will shortly relate.

The man was what is known as a dipper. On October 11, 1930, he was engaged in the galvanizing department of the appellants' works. Part of his work consisted in removing the dross, which one of the witnesses said was "a very heavy part of the job." It was immediately after this work that he complained of pain, and about ten minutes afterwards he died. The explanation of his death, as found by the learned county court judge, was this: That he was "suffering from a disease of the coronary arteries as the result of an attack of syphilis, and the effect of this disease was that the arteries, on October 11,

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(1) (1902) 5 F. 120.

(2) [1903] A. C. 443.

(3) 20 B. W. C. C. 222.

(4) (1928) 21 B. W. C. C. 87.

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1930, failed to supply the amount of blood necessary for the heart to function when the man was doing his ordinary work in the ordinary way, and that this failure resulted in a condition known as angina pectoris and in failure of the heart." He further states no personal injury was caused to him and that he died because "owing to the disease from which he was suffering, certain organs failed to function so as to enable him to carry on his ordinary work during that day." Upon that the learned county court judge found, being, as he thought, constrained by authority, that a sum of 600*l*. should be allotted to the widow and her three children; and his finding has been supported by the Court of Appeal.

Now the real case as made against the judgment appealed from is this, that, in order to establish that a man is entitled to the benefit of the Act, it is necessary to show that he has suffered an injury as the result of some definite thing that he did in the course of his work. If, in the normal course of his work, owing to the imperfect condition of his arteries or whatever other internal organ may have been diseased, he breaks down and dies, the appellants' case is that, although the work contributed to the death, that is not sufficient unless you can point to a specific injury resulting from a specific act. That would also appear to have been the view of the learned county court judge, if he had not thought that authority was too strong for him.

My Lords, whatever may have been said about the merit of that argument some twenty years ago, it appears to me it is impossible to be effectively advanced to-day, while this House, as well as all the other Courts, are bound by what was decided in the case of *Clover, Clayton & Co.* v. *Hughes.* (1) In that case a workman, who was suffering from a serious aneurism, was employed on tightening a nut by a spanner when he fell down dead. The county court judge found the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal, and this House—

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(1) [1910] A. C. 242.

Lord Atkinson and Lord Shaw dissenting—held that it was a case of personal injury by accident arising out of and in the course of the employment. There appears to me to be no possible ground of distinction between this case and that, excepting that in that case the work that the man was doing caused his arteries to rupture, and in this case produced the condition described by the learned county court judge which caused his heart to fail to function and produced the attack of angina pectoris which resulted in his death. The general principles of this matter are stated in some considerable detail by Lord Loreburn (1), and it is well that these words should be remembered to afford the guidance which counsel for the appellants ask this House to give. Lord Loreburn says this: "I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. . . . An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health." And he continues (2): "In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?" The answer to that question has been found in this case in the clearest terms, and, if any possible comment could be made upon the conclusions of the learned county court judge, my feeling would be that they had not been sufficiently emphatic as to the association of the employment and the disease which resulted in death. Lord Macnaghten, who gave judgment to the same effect as Lord Loreburn, makes a statement which is of considerable importance. He says (1): "The real question, as it seems to me, is this: Did it" (the death) "arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding. . . . . 'The death,' the learned judge says, 'was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work, but it was too heavy for him." Lord Collins, who also held the same opinion as Lord Loreburn and Lord Macnaghten, refers (2), and I think effectively refers, to a case of *Stewart* v. *Wilsons and Clyde Coal Co.* (3), in which Lord M'Laren said: "If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in . . . . this is accidental injury in the sense of the statute." My Lords, with that as a guidance to this House, it seems to me that, when the learned county court judge has held that the result of the work was the failure of the blood supply resulting in angina pectoris, and that it was because he was engaged in doing his ordinary work in this diseased condition that this failure arose, and that the work and the disease together contributed to the death, it would be impossible to deny that this case is within the actual meaning of the words I have quoted.

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(1) [1910] A. C. 246.

(2) Ibid. 247, 249.

(1) [1910] A. C. 247, 249.

(2) Ibid. 256.

(3) 5 F. 120, 122.

My Lords, in my opinion the judgment of the Court of Appeal in this case is right and should be affirmed.

Lord Warrington of Clyffe. My Lords, I agree.

Lord Tomlin. My Lords, I concur.

Lord Russell of Killowen. My Lords, I agree.

Lord Wright. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 3, 1933.

Solicitors for appellants: *L. Bingham & Co.*
Solicitors for respondent: *Pattinson & Brewer.*

[PRIVY COUNCIL.]

J. C.*
1933
April 10.

CONSOLIDATED DISTILLERIES, LIMITED, AND ANOTHER . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Exchequer Court—Jurisdiction—Revenue—Export Bond—Goods withdrawn from Bonded Warehouse—Action on Bond—Conditions of Bond—Satisfaction of Collector—Fabricated Documents—Exchequer Court Act (*R. S. Can.*, 1927, *c.* 34), *s.* 30—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 101.

Sect. 30 (*d*) of the Exchequer Court Act of Canada, which provides that that Court shall have original jurisdiction "in all other actions and suits of a civil nature . . . . in which the Crown is plaintiff or petitioner," should be read, in view of the preceding sub-sections, as confined to actions and suits in relation to some subject-matter in regard to which legislation is within the competence of the Dominion. So read the provision is intra vires under s. 101 of the British North America Act, 1867, and gives the Exchequer Court jurisdiction in an action by the Crown upon a bond entered into pursuant to the Inland Revenue Act of Canada upon the withdrawal of goods from a bonded warehouse for the purpose of export.

Upon the true construction of the printed departmental form of bond used in those circumstances the bond becomes void if the obligor accounts for the goods to the satisfaction of the collector of inland revenue. That condition is performed where the collector, acting upon apparently genuine official documents certifying the landing of the goods at the foreign port, has cancelled the bond by making an entry in his book of record, even if, without the knowledge of the collector or the obligor, the documents have been fabricated.

Judgment of the Supreme Court of Canada [1932] S. C. R. 419 affirmed as to jurisdiction, but reversed as to liability on the bonds.

CONSOLIDATED APPEALS (No. 80 of 1932) by special appeal from three judgments of the Supreme Court of Canada (March 15, 1932) affirming three judgments of the Exchequer Court (March 13, 16, 17).

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Each of the three actions giving rise to the consolidated appeals was brought by the Crown in the Exchequer Court of Canada on a bond or bonds given by the respective appellants to the Crown in 1924 pursuant to the Inland Revenue Act (R. S. Can., 1906, c. 51), and the regulations made thereunder, in respect of cases of spirits withdrawn from a bonded warehouse in Ontario for the purpose of export. The penal sum named in each bond was double the amount of the excise duty which would have been payable on the goods, the total penalties under the twelve bonds sued on being $587,400.

Two questions arose upon the present appeal: (1.) Whether the Exchequer Court had jurisdiction in the actions; (2.) whether the liability of the appellants upon the bonds had been discharged. A further question—namely, whether the appellants, if liable, were liable for the full amount of the sums named in the bonds, was dealt with in the Courts in Canada, but a decision in the present appeal became unnecessary.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada (Anglin C.J. and Duff, Rinfret and Lamont JJ.), affirming the judgment of Maclean J. in the Exchequer Court, held that the Exchequer Court had jurisdiction in the actions, and that the present appellants were liable to the full amounts stated in the bonds. The proceedings in the Supreme Court are reported at [1932] S. C. R. 419; those in the Exchequer Court at [1931] Ex. C. R. 85.

1933. March 20, 21, 23. *Tilley K.C.* and *Horace Douglas* for the appellants. On the true construction of the bonds they were to be void if the appellant company "shall account for the goods to the satisfaction of the collector." That alternative condition was performed. The evidence shows that the collector accepted the documents as proving that the spirits had been landed at the foreign port. He cancelled the bonds within the time provided for cancellation by regulation 17. If there was any fraud in connection with the documents, it was not shown that the appellants were parties to it. Under R. S. Ont., 1927, c. 107, s. 30, the landing certificates are to be presumed to have been correct. The bonds, having been cancelled pursuant to the regulations, afforded no cause of action.

Further, the Exchequer Court had not jurisdiction to try the actions. The appellants concede that under s. 101 of the British North America Act, 1867, the Parliament of Canada had power, ancillary to its power as to excise, to confer jurisdiction to enforce the bonds, but s. 30 of the Exchequer Court Act has not that effect. The actions were not "to enforce any law of Canada" so as to be within s. 30 (*a*); they were to enforce civil obligations. So far as s. 30 (*d*) would appear to confer jurisdiction in the actions it was ultra vires. Having regard to s. 92, heads 13 and 14, it was not competent to the Dominion Parliament to confer jurisdiction to try actions to enforce civil obligations in a Province: *Consolidated Distilleries* v. *Consolidated Exporters Corporation.* (1) The principle applied in *Att.-Gen.* v. *Walker* (2) and *Reg.* v. *Finlayson* (3) that the Crown can sue in any Court is subject to the statutory jurisdiction of the Court.

In any case the appellants were not liable on the bonds for more than the loss or damage actually sustained by the revenue; neither the Inland Revenue Act nor the regulations provided for bonds for penal sums: *Clark* v. *Barnard* (4); *U. S.* v. *Zerbey.* (5) [Reference was made also to *Carling Export Brewing and Malting Co.* v. *The King.* (6)]

Rowell K.C. and *Frank Gahan* (with them *Plaxton K.C.*) for the appellants. By s. 101 of the British North America Act, 1867, the Parliament of Canada had power to establish additional Courts "for the administration of the laws of Canada," which includes all laws then in force, whether Imperial, Dominion or Provincial, and the power is expressed to be "notwithstanding anything in this Act." The power under s. 101, therefore, was not subject to the Provincial powers under s. 92: *Valin* v. *Langlois.* (1) If there is an overlapping of the powers of the Dominion and the Province the former prevails: *Crown Grain Co.* v. *Day* (2); *In re Silver Brothers, Ld.* (3) The bonds being the property of the Dominion, the Dominion had exclusive power to legislate as to the method of enforcing them: *Burrard Power Co.* v. *The King.* (4) Sect. 30 (*d*) of the Exchequer Court Act, therefore, was intra vires, even if its words are given the widest interpretation. Further, there is a presumption that the Parliament of Canada intended to legislate within its powers, and the section should be so interpreted if possible: *Macleod* v. *Att.-Gen. for New South Wales* (5); *Att.-Gen. for Canada* v. *Cain* (6); *Att.-Gen. for Ontario* v. *Reciprocal Insurers.* (7) Having regard to the matters dealt with in the section, sub-s. (*d*) can be construed as confined to matters within the legislative power of the Dominion. *Consolidated Distilleries* v. *Consolidated Exporters Corporation* (8) is distinguishable; it related to a third party proceeding, and the judgments recognized that the Exchequer Court had jurisdiction in an action by the Crown to enforce an excise bond. The Court had jurisdiction also under s. 30 (*a*), because the bonds having been given in compliance with a law of Canada, actions to enforce them were actions to enforce that law.

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(1) [1930] S. C. R. 531.
(2) (1877) 25 Grant, 233.
(3) (1897) 6 Ex. C. R. 202.
(4) (1883) 108 U. S. 436.
(5) (1926) 271 U. S. 332.
(6) [1931] A. C. 435.

Upon the true construction of the bonds they were to be void only if the goods were exported and entered at the named port. Having regard to ss. 68 and 140 of the Inland Revenue Act, and regulations 16 and 17, that was the essential condition of the bonds. The words relied on for the appellants did not form an alternative condition, but merely a method of proof. The documents were concurrently found to be fraudulent and the cancellations made, acting upon them, were unauthorized and inoperative.

(1) (1879) 5 App. Cas. 115.
(2) [1908] A. C. 504.
(3) [1932] A. C. 514, 521.
(4) [1911] A. C. 87.
(5) [1891] A. C. 455.
(6) [1906] A. C. 542.
(7) [1924] A. C. 328.
(8) [1930] S. C. R. 531.

The appellants were liable to the full amount of the bonds, even if no fraud on their part was proved : *Rex* v. *Dixon.* (1)

Tilley K.C. in reply. The legislative power of the Dominion under s. 91, head 1, of the British North America Act, 1867, with regard to "the public debt and property" does not extend to all property which it may acquire.

April 10. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. These are three appeals (consolidated into one) from three judgments of the Supreme Court of Canada affirming the judgments of the Exchequer Court of Canada delivered in three actions which had been brought by the Crown for the purpose of recovering moneys alleged to be due under certain bonds executed by the appellants in favour of the Crown in the circumstances hereinafter mentioned. The appellants Hume and King are parties to all or some of the bonds, but where subsequently used in this judgment the word "appellants" refers to Consolidated Distilleries, Ld., only.

The bonds in question were given in pursuance of the provisions of the Inland Revenue Act (R. S. Can., 1906, c. 51) and the regulations thereunder, in respect of the export of certain spirits which had, pursuant to s. 61 of the said Act (hereinafter referred to as "the Revenue Act"), been deposited in an excise bonding warehouse at Belleville, Ontario, and on which, accordingly, no excise duty had been paid.

The relevant provisions of the Revenue Act in regard to the export from Canada of spirits so deposited are ss. 58, 68, 140 and 142, which run thus :—

"58. No goods, subject to a duty of excise under this Act, shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, licensed as herein provided, or from any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required.

68. Goods warehoused under this Act may be transferred in bond, and may be exported or removed from one warehouse

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(1) (1822) 11 Price, 204.

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to another, without payment of duty, under such restrictions and regulations as the Governor in Council deems necessary.

140. The Governor in Council may make such regulations for the warehousing and for the ex-warehousing, either for consumption, for removal, for exportation, or otherwise, of goods subject to a duty of excise, and for giving effect to any of the provisions of this Act and declaring the true intent thereof in any case of doubt as to him seems meet.

142. All regulations made under this Act, whether made by the Governor in Council or departmental, shall have the force of law, and any violation of any such regulation shall subject the holder of a licence under this Act, or any other person in the said regulations mentioned, to such penalty or forfeiture as is, by the said regulations, imposed for such violation, and the same shall be enforced in like manner as other penalties and forfeitures imposed by this Act."

Certain regulations appear to have been made, which were approved by Orders in Council and which contain the following provisions :—

"15. Entry of goods ex-warehouse for exportation must be made on the forms sanctioned by the department, and must contain an exact specification of the goods intended for exportation : see s. 10. With every such entry, an export bond shall be taken in the prescribed form.

16. Export bonds shall be conditioned for the due delivery of the goods bonded at the place designated in the entry within a specified time, which time in any case shall not exceed the time usually necessary for the performance of the voyage or journey by the conveyance adopted (allowing a reasonable time for detention within the discretion of the collector) and for returning the vouchers by the next mail ; and in no case shall the period allowed for the cancellation of the export bond exceed six months unless special authority has been granted by the department.

17. . . . . In all cases where the exportation out of Canada is by a bonded railway, or by a vessel clearing for a port outside of Canada and plying on a published route and schedule, with first port of call a port outside of Canada, such

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evidence of exportation of the goods as is above herein provided for, shall operate as a cancellation of the bond, notwithstanding the actual terms of the obligation of the bond.

In all other cases the bond shall not be cancelled, unless: (1.) Within the period named in said bond, there be produced to the proper collector or officer of customs and excise the duly authenticated certificate of some principal officer of customs at the place to which the goods were exported, stating that the goods were actually landed and left at some place (naming it) out of Canada, as provided by the said bond; or, (2.) Within the period of three months from the date of the exportation of the goods, evidence satisfactory to the commissioner of customs and excise shall be furnished to him that the goods so undertaken to be exported shall not have been re-landed in Canada, or if re-landed in Canada, that the proper entry has been made at customs and the proper duties paid thereon.

Where a shortage occurs in goods so forwarded, ex-warehouse for exportation, and same are not accounted for by exportation from out of Canada to the department of customs and excise on export entry No. B-13, it is the duty of the collector of customs and excise at the frontier port where such goods were short received for exportation, to notify the collector of customs and excise of the port from which such goods were shipped for exportation, when the collector of customs and excise for said port shall require the consignor to pass entry, and pay the lawful duty payable upon the goods short delivered at the frontier port, in accordance with the regulations contained in departmental circular No. G.797."

No form of bond was prescribed by the Revenue Act or by the regulations; but a printed departmental form of bond was in fact used.

The relevant facts may now be stated. It will, their Lordships think, be sufficient if the facts relating to one action only are stated in detail, attention being drawn to any material difference which exists in regard to the others. For this purpose they select the first action (No. 9370).

On February 4 and 5, 1924, the appellants received orders from a customer, Consolidated Exporters Corporation, Ld.,

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to ship altogether 4250 cases of spirits to John Douglas & Co., Corinto, Nicaragua. The cases were taken out of the excise bonding warehouse at Belleville and sent by rail to Vancouver, where they were placed on board the steamship *Malahat*, the master of that vessel signing four "Entry for export ex-warehouse" forms, which covered respectively 1000, 1250, 1000 and 1000 cases, as having received the goods "on board the steamship *Malahat* for exportation to John Douglas & Co., Corinto, Nicaragua." 2250 cases were taken out of the warehouse on February 8, 1924, and on that date two bonds were executed by the appellants and Hume, one in a sum equal to double the amount of duty in respect of 1250 cases, the other in a sum equal to double the amount of duty in respect of 1000 cases. On February 12, 1924, two further bonds were executed by the same parties in sums amounting altogether to double the amount of duty in respect of the balance of 2000 cases which were taken out of the warehouse on that day. The *Malahat* sailed from Vancouver on February 23, 1924. As appears from her "Report outwards," two of the 2000 cases never reached the *Malahat;* they apparently disappeared in transit from Belleville, and on them duty has been paid.

On April 7, 1924, the appellants notified the collector of customs and excise at Belleville (Mr. Geen) that the owners of the *Malahat* had received instructions from the shippers (Consolidated Exporters Corporation, Ld.) and the consignees (John Douglas & Co.) to discharge the cargo at Buenaventura, Colombia, in place of Corinto, Nicaragua, and requested him to make a note of the fact on his records.

The appellants subsequently received from the shippers four "Entry for export ex-warehouse forms," covering respectively the 1250, 1000, 998, and 1000 cases upon each of which appeared the following certificate: "I, G. W. Yates, do hereby certify that the same identical goods described and contained in the within export entry have been landed at the port of Buenaventura in Colombia and have been duly delivered over to the customs. Witness my hand and seal of office this 21 day of Marzo 1924. G. W. Yates."

There appeared upon the document a stamp, or seal, purporting to be the stamp or seal of the British consular agency, Buenaventura, and there were pasted on the document what purported to be two tax stamps of the British consular agency, Buenaventura, with the date March 21/24. At the foot of the form is to be found the following printed note: "NOTE.—If the goods are exported to Great Britain or any British colony or possession, this certificate may be signed by any principal officer of customs or of colonial revenue at the place to which the goods are exported, or if such goods are exported to any place in any foreign country, it may be signed by any officer of customs therein, or any British or foreign consul or vice-consul resident there."

These four documents were forwarded by the appellants to Mr. Geen, in a letter dated April 24, 1924. Mr. Geen, acting upon those documents, cancelled the four bonds by making entries in the record book to show that they were cancelled. According to practice, the bonds were not delivered up, but remained on the file at the excise office where they had been placed when the goods were being shipped.

The *Malahat* returned to Vancouver in ballast on May 15, 1924, bringing with her a bill of health and foreign clearance, both dated April 5, 1924, the former purporting to be given by the British Consul at Buenaventura, and the latter purporting to grant permission from the port authority at Buenaventura for the *Malahat* to sail that day for Vancouver direct in ballast.

In truth, the *Malahat* never went to Buenaventura. She sailed right down the coast to a point about twelve miles south of the boundary between the United States and Mexico, and discharged her cargo into sundry vessels at various points from twenty to fifty miles out at sea off the coasts of California and Lower California. Having disposed of her cargo, she received the bill of health and foreign clearance above mentioned, from a vessel on the high seas, and returned to Vancouver.

In the second action (No. 9371) the facts are substantially the same. The goods, however, were taken from an excise bonding warehouse at Vancouver, and were shipped on board the steamship *Prince Albert*, for delivery to W. O. Watson at Chiperinco, Guatemala. Subsequently, notice was given to the collector at Vancouver of a change from Chiperinco to Buenaventura. The appellants received a landing certificate signed by the British consular officer at Buenaventura, stating that the goods had been delivered to the Customs there. The *Prince Albert* never went to Chiperinco. On production of this certificate the collector at Vancouver cancelled the one bond which had been given, by writing the word " cancelled " on the bond. By admissions consented to by the parties it must be taken that the collector cancelled the bond upon the belief that the landing certificate was genuine and true. The appellant Smith was a party to this bond.

In the third action (No. 10,314) the facts are substantially the same as in the first action except that the goods were, according to the documents, consigned in the *Malahat* to La Libertad, San Salvador. On receipt of the landing certificates Mr. Geen wrote and informed the appellants that " the bonds covering the above shipments have been cancelled." By admissions consented to by the parties it must be taken that Mr. Geen cancelled the bonds in accordance with his usual custom, that he believed the landing certificates to be genuine and true, and that he cancelled the bonds upon this belief.

When the true facts had been ascertained, the Attorney-General for Canada filed three informations in the Exchequer Court of Canada, claiming on behalf of His Majesty the full amount of the sums named in the bonds. Of the three informations, one related to each of the three shipments in the *Malahat*, the *Prince Albert*, and the *Malahat*, respectively.

At this point it is necessary to state the form of the condition of the bonds. After proclaiming that the persons in question are bound to the King in the stated sum, the document recites that the appellants have given notice of intention to export to the specified port in the specified ship of which the specified individual is master, the specified goods (designated by the marks, numbers, and contents of packages), and then proceeds as follows (the sample given being the bond covering the 1250 cases taken out of the bonding warehouse on February 8, 1924): "Now the condition of the above written obligation is such that if the said goods and every part thereof shall be duly shipped, and shall be exported and entered for consumption or for warehouse at Corinto, Nicaragua, aforesaid, and if proof of such exportation and entry shall, in accordance with the requirements of the warehousing regulations in that behalf, be adduced within 60 days from the date hereof, to the satisfaction of the said collector of inland revenue for the division of . . . . or if the above bounden Consolidated Distilleries, Ld., shall account for the said goods to the satisfaction of the said collector of inland revenue for the said inland revenue division of Vancouver, B.C., then this obligation to be void, otherwise to be and remain in full force and virtue." It is common ground that in this condition the word "Belleville" must be substituted for the words "Vancouver, B.C."

The information in each case contained specific allegations showing that the condition of the bond had not been performed.

The appellants in each case pleaded (amongst other pleas) that they were not indebted; that the bonds were void; that the goods were actually exported from Canada, had left Canada, and had never been relanded in Canada; and that the Court of Exchequer had no jurisdiction to decide the matter at issue.

In reply, it was roundly alleged that the appellants had devised a fraudulent scheme to obtain the removal of liquors from customs bond without payment, by the production of landing certificates, forged or otherwise fraudulently procured, and that any cancellation of the bonds based on the production of such false certificates was ineffective.

It must here be stated that this charge of fraud against the appellants was never established, and that the case fell and falls to be decided upon the footing that the appellants had no reason to believe that the landing certificates which they sent to the collector were other than honest documents being what they purported to be, and that the facts therein certified were correctly and truthfully certified. It should further be stated that it was not established in the actions whether the landing certificates were in fact forgeries or (if genuine) by what means they had been procured.

In the Exchequer Court it was ordered and adjudged that the plaintiff do recover from the defendants the full sums named in the bonds without interest with his taxed costs of action. The learned President (Maclean J.) held that the conditions of the bonds had not been performed, that the cancellations did not discharge the defendants, because the cancellations were procured by fraud. He also held that the Exchequer Court had jurisdiction to deal with the matter; but that no interest was recoverable.

Upon appeal to the Supreme Court by the defendants and cross-appeal by the plaintiff (as to interest), the appeal and cross-appeal were both dismissed with costs. The question of interest was not further in dispute before the Board. Anglin C.J. upheld the jurisdiction of the Exchequer Court, and thought that a breach of the condition of each bond had been clearly established, and that the full amount named in each bond must be paid. Duff J. (with whom Rinfret and Lamont JJ. concurred) agreed that the Court had jurisdiction. He thought that the cancellations of the bonds were inoperative, the documents upon which the cancellations proceeded being concocted documents, and that the conditions under which the regulations alone permitted cancellation never came into effect. He further held that what he termed "the alternative condition" of the bond had not been performed, because there was no ground for finding that the appellants did account for the goods to the satisfaction of the collector. He thought that the whole amount named in the bond was recoverable.

Upon appeal to His Majesty in Council various points were argued and discussed, but in the view which their Lordships take of the rights of the parties it is only necessary to deal with two matters—namely: (1.) whether the Court of Exchequer had jurisdiction to try the actions, and

(2.) whether in the circumstances which exist in these cases the condition of the bonds was fulfilled so that the bonds, without the necessity of any cancellation (in the sense of a release of an otherwise existing obligation), became void and ceased to be binding according to their tenor. In particular their Lordships express no opinion upon the correctness of the view which has prevailed in the Courts below that the Crown (if entitled to succeed in the actions) was entitled to recover the full amount of the penalties secured by the bonds.

The question of jurisdiction depends upon a consideration of the British North America Act, 1867, and the Exchequer Court Act (R. S. Can., 1927, c. 34). The matters in regard to which the Provincial legislatures have exclusive power to make laws include, under the British North America Act, s. 92, head 13—" Property and civil rights in the province " —and s. 92, head 14—" The administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." Sect. 101, however, provides that : " The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the . . . . establishment of any additional courts for the better administration of the laws of Canada."

The Exchequer Court of Canada was constituted in the year 1875 in exercise of this power. It was conceded by the appellants (and rightly, as their Lordships think) in the argument before the Board, that the Parliament of Canada could, in exercising the power conferred by s. 101, properly confer upon the Exchequer Court jurisdiction to hear and determine actions to enforce the liability on bonds executed in favour of the Crown in pursuance of a revenue law enacted by the Parliament of Canada. The point as to jurisdiction accordingly resolves itself into the question whether the language of the Exchequer Court Act upon its true interpretation purports to confer the necessary jurisdiction. The relevant section is s. 30, which is in the following terms : " 30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information in rem, and as well in qui tam suits for penalties or forfeiture as where the suit is on behalf of the Crown alone; (*b*) in all cases in which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands; (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. R. S., c. 140, s. 31." By virtue of s. 2 (*a*) the Crown means the Crown in right or interest of the Dominion of Canada.

The learned President held that the Exchequer Court had jurisdiction, inasmuch as the bonds were required to be given by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. The subject-matter of the actions directly arose from legislation of Parliament in respect of excise.

The Chief Justice thought that the cases fell clearly within s. 30 (*d*), and probably also within s. 30 (*a*). Duff J., while suggesting a possible doubt as to the application of sub-s. (*a*), held that the cases were plainly within sub-s. (*d*).

Their Lordships are anxious to avoid expressing any general views upon the extent of the jurisdiction conferred by s. 30, beyond what is necessary for the decision of this particular case. Each case as it arises must be determined in relation to its own facts and circumstances. In regard to the present case their Lordships appreciate that a difficulty may exist in regard to sub-s. (*a*). While these actions are no doubt "cases relating to the revenue," it might perhaps be said that no law of Canada is sought to be enforced in them. Their Lordships, however, have come to the conclusion that these actions do fall within sub-s. (*d*). It was suggested that if read literally, and without any limitation, that sub-section would entitle the Crown to sue in the Exchequer Court and subject defendants to the jurisdiction of that Court, in respect of any cause of action whatever, and that such a provision would be ultra vires the Parliament of Canada as one not covered by the power conferred by s. 101 of the British North America Act. Their Lordships, however, do not think that sub-s. (*d*), in the context in which it is found, can properly be read as free from all limitations. They think that in view of the provisions of the three preceding sub-sections the actions and suits in sub-s. (*d*) must be confined to actions and suits in relation to some subject-matter, legislation in regard to which is within the legislative competence of the Dominion. So read, the sub-section could not be said to be ultra vires, and the present actions appear to their Lordships to fall within its scope. The Exchequer Court accordingly had jurisdiction in the matter of these actions.

There remains for consideration the second question, which is indicated above, and which turns mainly upon the true construction of the condition of the bonds. This construction appears reasonably plain. The obligation is to be void upon the happening of one of two alternative events. The first of these is a compound event consisting of (1.) the goods being shipped, exported and entered for consumption or for warehouse at the specified port; and (2.) proof of such exportation and entry in accordance with the regulations being adduced within a fixed time to the satisfaction of the collector. The second alternative event is the appellants accounting for the goods to the satisfaction of the collector. It was contended on behalf of the Crown that upon the true construction, the first limb of the compound event indicated above applied to the whole condition. This does not appear to their Lordships a construction consonant either with grammar or with probability. It would give but small scope for the operation of the last sentence of the condition; for if the actual fact of exportation and entry must exist in all cases before the obligation is avoided, it

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follows that the existence of that fact must be established by proof, in which case there could be (apart from the question of time limit) no room for any other or further accounting for the goods. On the other hand, a reasonable and probable construction is that the last sentence is introduced as a second alternative event (a safety-valve) which though it would include the first alternative will also meet the cases, which must from time to time occur, where compliance with the opening sentence of the condition has for some reason become impossible. Of such cases, the first shipment here in the *Malahat* (which was not plying on a published route or schedule) would form an excellent example if the shippers had been acting honestly. Owing to a change after the execution of the bond of the port specified in the condition, the obligation could never have been avoided according to its tenor if the Crown's construction were the correct one. The obligation would necessarily continue unless and until cancellation (in the sense of release) was obtained by furnishing to the satisfaction of the commissioner of customs and excise the evidence required by the later part of regulation 17 within the period of three months from the date of the bond.

It was further contended that the condition should be construed in the light of the regulations which are referred to therein, and that the light so shed, in particular by regulation 16, revealed that the bonds were to be solely conditioned for the due delivery of the goods at the place designated in the entry for export. Even if regulation 16 may properly be read for the purpose of construing the condition (and their Lordships are not satisfied that it may), it does not bear the construction placed upon it by the Crown. The emphasis is upon the necessity of a limit of time within which delivery has to take place, and there is no prohibition in the regulation of a condition with alternatives.

Upon the true construction of the condition their Lordships feel no doubt that the obligation under the bonds was avoided if and when the appellants accounted for the goods to the satisfaction of the collectors.

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The final question then remains, did they in fact so account for the goods ?

The appellants believed and the collectors believed that the goods had been landed at Buenaventura and La Libertad. They had no reason to doubt the genuineness or the truthfulness of the landing certificates. Mr. Geen, in his evidence in the first action, says that he acted upon them and cancelled the bonds, believing that the goods had gone to Buenaventura. The fact of what has been called the cancellations of the bonds, is the best possible evidence that in each case the appellants did in fact account for the goods to the satisfaction of the collector. Once that state of affairs was brought into existence, then according to the terms of the bond, the obligation thereunder became void. Their Lordships can see no escape from that conclusion.

It was argued that this result could not ensue because the crucial fact had been brought about by the production of fraudulent documents. Whatever might be the position if the appellants had been parties to the fraud (as to which their Lordships say nothing), the facts here are otherwise. The appellants acted in good faith.

It was further contended that the satisfaction of the collector having been brought about by innocent misrepresentation, the obligation under the bonds should in some way be re-created and restored. Such an argument might be sustainable if the appellants had been forced to rely upon cancellation in the sense of a release, or an agreement to release. It might then be said that that was a transaction which had been procured by innocent misrepresentation, and that it should be set aside with the result of restoring that which had been released or contracted to be released. Their Lordships express no view as to this. There is, however, no room for such a contention here. The appellants are not relying upon any outside transaction to free them from liability. They are relying only upon the terms of the document which created the liability and which provided that the liability should end with the happening of a certain event. Their Lordships are not aware of any doctrine equitable or otherwise which entitles the Crown to say that the event is to be deemed not to have happened, or that liability under the bond is to survive notwithstanding that the event, which according to the bond avoids the obligation, has in fact happened.

The result is that in the opinion of their Lordships the appellants are under no liability in respect of the bonds. When the true position is realized it would seem strange if the Crown could in these cases recover these double duties. The actual destination of the liquor may well be suspected; the least likely scene of its actual consumption is Canada. So long as it left Canada and was not relanded there, no duty would be payable under the Revenue Act. The Revenue Act is not concerned with prohibition legislation, but with collecting excise duty where under its provisions it is properly payable. It would indeed be matter for comment and wonder if the Crown were entitled to double duties in a case where no duty was payable under the Act at all, and where the bonds in suit were only required by the Act to be given as security for the payment of duty.

This appeal should be allowed, the orders of the Supreme Court and the Exchequer Court should be set aside (but as to the orders of the Supreme Court not so far as they dealt with the Crown's cross-appeal and dealt with the costs thereof), and an order should be made in each of the three actions dismissing the action with costs. The respondent should pay to the appellants their costs of their appeals in the Supreme Court and here. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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HOLDEN . . . . APPELLANT;

AND

MINISTER OF NATIONAL REVENUE . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income War Tax—Trust—Beneficiaries not resident in Canada—Accumulation for unascertained Persons—Separate Trusts under Will—Separate Assessments—Income War Tax Act (R. S. Can., 1927, c. 97), s. 11, sub-s. 2.

The Income War Tax Act, 1917, and amendments—now R. S. Can., 1927, c. 97—imposed an income tax on residents in Canada, and it was provided by a retrospective amendment of 1920, now s. 11, sub-s. 2, of the revised statute, that "Income accumulating in trust for the benefit of unascertained persons, or persons with contingent interests, shall be taxable in the hands of the trustee . . . . as if such income were the income of an unmarried person."

The appellant, a resident in Canada, was the sole surviving trustee under the will of a Canadian, who died in 1914. By the will the balance of the income of the estate, after certain dispositions, was to be divided into three equal parts, out of each of which the trustees were to apply so much as they thought advisable to the support, maintenance and education of each of the testator's three children until they attained respectively twenty-five years of age, or until the period of distribution; any portion of any child's share not required for the above purpose was to be reinvested and form part of the residue bequeathed to that child; after the death or remarriage of the testator's wife, the residue of the estate was to be equally divided between such of the three children as should attain the above age, the share of any child who died before the period of distribution to be taken by his child or children.

Held, that under s. 11, sub-s. 2, of the revised statute surplus income accumulating under the above provision of the will was taxable in the hands of the appellant irrespective of whether the children or any of them were resident in Canada; but that the whole surplus income did not form an indivisible taxable integer, as there were three distinct trusts, the income under each of which should be separately assessed.

Judgment of the Supreme Court of Canada [1932] S. C. R. 655 varied as to separation of the assessments.

APPEAL (No. 76 of 1932) by special leave from a judgment of the Supreme Court of Canada (July 15, 1932) reversing a judgment of the Exchequer Court (October 20, 1931).

* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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The appeal related to assessments to tax for the years 1917–1928 under the Income War Tax Act, 1917, and amendments—now R. S. Can., 1927, c. 97—made upon the appellant, the sole surviving trustee under the will of a Canadian testator who died in 1914, in respect of the income of the residuary estate of the testator.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court of Canada, reversing the Exchequer Court, held that under a retrospective amendment of 1920—now s. 11, sub-s. 2, of the revised statute—the assessments were properly made upon the appellant whether or not the testator's three children, the beneficiaries, were or were not resident in Canada. The proceedings in the Supreme Court are reported at [1932] S. C. R. 655, and those in the Exchequer Court at [1931] Ex. C. R. 215.

1933. March 23, 24. *Rowell K.C.* and *Frank Gahan* for the appellant referred to *McLeod* v. *Minister of Customs and Excise* (1) and *Minister of National Revenue* v. *Royal Trust Co.* (2)

J. M. Stewart K.C. and *Plaxton K.C.* for the respondent were called upon only upon the contention that there should have been three separate assessments ; they referred to *Mersey Docks and Harbour Board* v. *Lucas.* (3)

April 10. The judgment of their Lordships was delivered by

LORD TOMLIN. The appellant, who is, and at all material times has been, resident in Canada is the sole surviving executor and trustee of the will of Duncan McMartin, who died on May 2, 1914, domiciled in the Province of Quebec.

Under the provisions of the Income War Tax Act, 1917, and the subsequent amending Acts, certain assessments to income tax for the years 1917 to 1928, both years inclusive, in respect of the income of the residuary estate of the testator were made on the appellant. The total amount of the tax claimed was $822,866.02. The assessments upon objection were confirmed by the respondent Minister, but were set aside on appeal to the Exchequer Court of Canada. The Supreme Court of Canada have reversed the judgment of the Exchequer Court of Canada and restored the assessments, and it is of that reversal that the appellant complains before His Majesty in Council.

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(1) [1926] S. C. R. 457.
(2) [1931] S. C. R. 485.
(3) (1883) 8 App. Cas. 891, 910.

By his will the testator, after giving certain pecuniary legacies, gave an annuity of $25,000 per annum to his wife until she should marry again, and directed that upon her remarriage the annuity should cease, but that she should then be paid out of his estate a legacy of $150,000. He then gave all the residue of his estate to his executors and trustees upon trust to sell and convert and to pay legacies and to invest the balance, and out of the income derived from the investments and the income or profits derived from the unrealized portion of his estate to pay his wife's annuity.

In clause 9, sub-clauses E and F, of his will, he disposed of the balance of the income and also of the corpus of his estate by directions to his trustees in the following terms :—

"(E) To divide the balance of the income from such investments or the income or profits derived from the unrealized portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they have respectively attained the age of twenty-five years, or until the period fixed for the distribution of the capital of my estate whichever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be reinvested by my said executors and trustees and form part of the residue of my estate given and bequeathed to such child.

(F) After the death or remarriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the

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age of twenty-five years, as and when they respectively attain that age, provided that if any of the said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares."

The facts with regard to the testator's family are as follows: (1.) The testator left him surviving a widow and three children, all of whom had been prior to and were on January 1, 1917, residing in the city of New York. (2.) The widow remarried on March 4, 1925, and was paid her legacy of $150,000. (3.) The three children of the testator were Allen A. McMartin, Melba McMartin and Duncan McMartin. (4.) Allen A. McMartin, the eldest child, resided in New York until January, 1926, when he took up his residence and since when he has resided in the City of Montreal in the Province of Quebec. On August 29, 1923, he married, but there has been no issue of his marriage. On November 4, 1928, he attained the age of twenty-five years. (5.) Melba McMartin, the second child, has throughout continued to reside in the United States of America. She has been twice married. Her first marriage was dissolved. There was issue of such marriage, one child only. Of the second marriage there has been no issue. On March 3, 1930, Melba McMartin (now Melba Orr) attained the age of twenty-five years. (6.) Duncan McMartin, the third child, has throughout continued to reside in the United States of America. He married on July 1, 1931, but there has been no issue of such marriage. He has not yet attained the age of twenty-five years, but attained the age of twenty-one years on February 17, 1930.

The relevant provision of the statutes which has been treated by the Supreme Court of Canada as applicable to the present case first appeared in s. 4 of an amending Act passed in 1920, and was by s. 16, sub-s. 1, of the same amending Act made retrospective so as to cover the taxation periods back to and including the year 1917.

The provision now appears as s. 11 in Part IV. of c. 97 of the Revised Statutes of Canada, 1927—Part IV. being headed "Special provisions relating to the incidence of the tax."

Sect. 11 is in the following terms :—

"Income from Estates and Trusts.

11. The income, for any taxation period, of a beneficiary of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period. (2.) Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person."

The assessments in question have made the appellant liable to tax in each of the relevant years in respect of so much of the income of this residue (treating such income as a single integer) as was not applied for the support, maintenance or education of any of the children.

Now it is to be observed that under the taxing statutes, non-residents in Canada are not taxable, and the Exchequer Court of Canada took the view that upon the true construction of the will, the persons interested in the income were ascertained persons and that as such presons were not resident in Canada (except Allen McMartin after he came to Montreal in January, 1926), the assessments could not be supported, though the share of Allen McMartin after January, 1926, would be taxable.

The Supreme Court of Canada differed from the Exchequer Court of Canada upon the construction of the will, holding that the income was accumulating for the benefit of unascertained persons or of persons with contingent interests, and that the place of residence of the testator's children was, upon the true construction of s. 11, a circumstance having no relevance.

Their Lordships are of opinion that upon the true construction of the will the balance of the income accumulated under clause 9 (E) of the will, is accumulated for the benefit of

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persons with contingent interests. The gift of the corpus to which, or to some share of which, surplus income becomes an accretion, is clearly a gift to a contingent class. Such gift cannot, in their Lordships' view, by any recognized canon of construction be converted into a vested one, because of the directions for application of some part of the income in the support, maintenance and education of those who are contingently interested in the corpus.

Further, their Lordships are satisfied that upon the true construction of the taxing Acts, s. 11, sub-s. 2, fixes the trustee of the accumulating income with liability for the tax, and is a true charging section, and that the position of the section in Part IV. under the heading to which reference has been made, does not justify a departure from what in their Lordships' view is the natural meaning of the words. It follows from this that the Supreme Court of Canada were, in their Lordships' judgment, correct in treating the place of residence of the testator's children as an irrelevant circumstance.

It is, however, to be observed that the Supreme Court of Canada have treated the whole of the surplus income arising from the estate as one indivisible taxable integer. In this respect their Lordships are of opinion that the Supreme Court of Canada has erred.

The surplus in any year from one child's share of income remaining after due provision made for such child's support, maintenance and education, may differ in amount from the surplus, if any, arising from any other child's share of income. Upon the true construction of the will the several surpluses are not to be aggregated and added to the general corpus of residue, but each surplus becomes an addition to the contingent share of corpus of the child to whom such surplus is attributable. If this was not the true construction of the will, it is difficult to find any disposition at all of the income arising from the investments representing a surplus of any given year.

Upon this view of the construction of the will their Lordships think that the assessments in question are wrong

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in treating in each year of taxation the whole surplus income of the residue as one indivisible taxable integer. There are, in fact, three distinct trusts which should be separately assessed and taxed.

In the result, therefore, their Lordships are of opinion that the judgment of the Supreme Court of Canada should be varied in so far as it confirms the assessments, and directs payment of costs, and in lieu thereof that directions should be given for remitting the assessments to the Exchequer Court of Canada to adjust the assessments so as to give effect to the conclusions which have been reached by their Lordships, and that it should be ordered that the appellant be paid by the respondent the same proportion of his costs of the proceedings in the Exchequer Court of Canada and in the Supreme Court of Canada respectively, as he is to receive of his costs of this appeal under the direction hereinafter contained. Any further costs hereafter to be incurred in the Exchequer Court of Canada will remain in the discretion of that Court.

In the adjustment of the assessments ultimately to be made, regard must be had to the fact (which appears hitherto to have been overlooked) that Allen A. McMartin attained the age of twenty-five years on November 4, 1928.

Their Lordships will humbly tender to His Majesty advice in accordance with the foregoing conclusions. The respondent must pay to the appellant, who has succeeded only in part but whose appeal was necessary for the substantial success he has had, two-thirds of the latter's costs of this appeal.

Solicitors for appellant : *Blake & Redden.*
Solicitors for respondent : *Charles Russell & Co.*

[PRIVY COUNCIL.]

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DOMINION BUILDING CORPORATION, LIMITED, AND ANOTHER . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Crown Land—Contract to Sell—Absence of signed Contract—Matter under Control of Minister of Railways—Purchaser claiming Damages—Whether Time of Essence—Statute not naming Crown—Department of Railways and Canals Act (R. S. Can., 1906, *c.* 35), *ss.* 3, 7, 15—*Mercantile Law Amendment Act (R. S. Ont.,* 1927, *c.* 161), *s.* 14—*Interpretation Act (R. S. Ont.,* 1927, *c.* 1), *s.* 10.

Sect. 15 of the Department of Railways and Canals Act (R. S. Can., 1906, c. 35), which provides that no deed, contract, document or writing relating to a matter under the control or direction of the Minister shall be binding upon His Majesty unless signed in accordance with the section, does not apply to a contract which is not embodied in an instrument or instruments in writing intended to be signed by some one on behalf of the Crown.

Reg. v. *Henderson* (1898) 28 Can. S. C. R. 425 approved.

Where, therefore, a written offer for the purchase of Crown land which has come under the control of the Minister provides that the offer, if accepted by an Order in Council, shall constitute a binding contract in the terms of the offer, there is a binding contract if the Order in Council is made, whether or not it is communicated to the purchaser, provided that the Minister has consented to the contract so as to satisfy s. 3, sub-s. 2, and s. 7 of the above Act.

Although the Crown is not named in s. 17, sub-s. 7, of the Ontario Judicature Act, 1881, reproduced in s. 14 of the Mercantile Law Amendment Act (R. S. Ont., 1927, c. 161), the section prevents the Crown from treating time as being of the essence of a contract if before the Act of 1881 it would not have been so regarded in a Court of equity in an action between subjects. The expression "the rights of His Majesty" in s. 10 of the Interpretation Act (R. S. Ont., 1927, c. 1) means the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alterations made by s. 17, sub-s. 7, of the Act of 1881 in thege neral law, might have accrued thereafter under some future contract.

Judgment of the Supreme Court [1932] S. C. R. 511 reversed.

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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v.
The King.

Appeal (No. 50 of 1932) by special leave from a judgment of the Supreme Court of Canada (June 30, 1932) reversing a judgment of the Exchequer Court (March 4, 1931).

The appellants claimed compensation or damages from the Crown for a repudiation by the Minister of Railways and Canals of an alleged contract by the Crown to sell certain freehold land in Toronto. The matter was referred by the acting Minister to the Exchequer Court under s. 38 of the Exchequer Court Act; the validity of the reference was upheld by a judgment of the Board reported at [1930] A. C. 90.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

The President of the Exchequer Court (Maclean J.) held that the appellants were entitled to damages, the amount of which was to be determined later.

The Supreme Court of Canada, by a judgment delivered by Smith J., and concurred in by Anglin C.J. and Rinfret and Lamont JJ., reversed the above decision and dismissed the action. The grounds of the judgment, which is reported at [1932] S. C. R. 511, appear shortly from the judgment of the Judicial Committee.

1933. March 24, 27, 28, 30. *W. A. Greene K.C.* and *Cyril Radcliffe* for the appellants. The Governor in Council had authority to effect the sale by s. 4 of the Public Lands Grants Act. The matter was not governed by the Department of Railways and Canals Act. But if it was, s. 15 of that Act did not apply, as the contract was not embodied, or intended to be embodied, in a written instrument: *Reg.* v. *Henderson.* (1) Upon the terms of the offer there was a complete contract when the Order in Council was made; it was communicated to the appellant Forgie, but that was not essential. So far as the consent of the Minister was necessary under the Act it was given. Time was not originally of the essence of the contract, and there were no circumstances of unreasonable delay justifying a notice to make it so, nor was any notice having that effect given: Fry on Specific Performance, 6th ed., pp. 510, 511.

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(1) 28 Can. S. C. R. 425.

Tilley K.C. and *Plaxton K.C.* for the respondent. The matter having come under the control of the Minister the sale was governed by the Department of Railways and Canals Act, and in the absence of a contract signed in accordance with s. 15 of that Act there was no contract binding on the Crown. *Reg.* v. *Henderson* (1) is distinguishable; it related to a claim for the price of goods sold and delivered under a verbal contract. In any case the appellants were not entitled to claim damages. Time was by necessary implication of the essence of the contract, or was made so when extensions were granted. The Ontario Judicature Act, 1881, s. 17, sub-s. 7, which enables all Courts to treat time as not being of the essence if before that Act a Court of equity would not have so treated it, is in the same terms as s. 25, sub-s. 7, of the (English) Judicature Act, 1873, and in *Stickney* v. *Keeble* (2) it was stated by Lord Parker of Waddington that that provision did not apply unless a Court of equity would have granted specific performance. In the present case, even between subject and subject, specific performance would not have been granted: *Kilmer* v. *British Columbia Orchard Lands* (3); *Steedman* v. *Drinkle* (4); *Barclay* v. *Messenger*. (5) Further, specific performance could not have been ordered against the Crown. Moreover, the Crown not being named in s. 17 of the Act of 1881, nor in s. 14 of the (Ontario) Mercantile Law Amendment Act, the Crown was not bound having regard to (Ontario) Interpretation Act, s. 10. The provision of the Act last mentioned dates from before Confederation, and occurs also in the Interpretation Act of Canada.

W. A. Greene K.C. in reply. The contract carried all the incidents of a contract between subjects. The passage referred to in *Stickney* v. *Keeble* (2) was dealing with a matter of procedure, but here the question whether time was of the essence was one of substance. The Exchequer Court came into existence after the fusion of legal and equitable remedies, and

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(1) 28 Can. S. C. R. 425.

(2) [1915] A. C. 386, 417.

(3) [1913] A. C. 319.

(4) [1916] 1 A. C. 275, 279.

(5) (1874) 30 L. T. 351, 354.

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the trial of the present matters was assigned to it under statute. There is nothing in the Exchequer Court Act to suggest that that Court is not to apply against the Crown all appropriate remedies, whether legal or equitable. Although specific performance could not be decreed against the Crown, the Court could make a declaration of the subject's rights. The provision in the Act of 1881 applied in this case, although the Crown was not named therein. [Reference was made to Craies' Statute Law, 3rd ed., p. 355 et seq.; Chitty's Prerogatives of the Crown, pp. 382, 383; *Magdalen College Case* (1); *Cayzer, Irvine & Co.* v. *Board of Trade* (2); *Clark* v. *Downes*. (3)]

May 9. The judgment of their Lordships was delivered by

LORD TOMLIN. This appeal arises out of a reference under s. 38 of the Exchequer Court Act by the acting Minister of Railways and Canals to the Exchequer Court of Canada of a claim by the appellants against the Crown for compensation or damages in respect of the refusal of the Crown acting through the Minister of Railways and Canals to carry out an alleged contract entered into by the appellants or one of them with the Crown for the purchase from the Crown of a property (hereinafter called "the Corner property") situate on the corner of King and Yonge Streets in the city of Toronto.

The appellants succeeded in the Exchequer Court, but on appeal by the Crown to the Supreme Court of Canada the judgment of the Exchequer Court was reversed and the appellants' claim was dismissed. Against such reversal and dismissal the appellants now appeal to His Majesty in Council.

Before the case was dealt with on its merits by the Exchequer Court, the validity of the reference was challenged by the respondent, but ultimately, on an appeal to His Majesty in Council, the validity of the reference was upheld. (4)

The Corner property had been originally acquired by the Crown under the provisions of the Expropriation Act

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(1) (1616) 11 Co. Rep. 66*b*, 68*b*, 74*b*.

(2) [1927] 1 K. B. 269, 294.

(3) (1931) 145 L. T. 20.

(4) [1930] A. C. 90.

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(R. S. Can., 1906, c. 143) for occupation by the Canadian National Railways.

In 1925, another property in King Street (hereinafter called "the Home Bank property"), which adjoined the Corner property towards the west, was for sale, and the appellant Forgie, either on his own account or acting for the first appellants, conceived the plan of acquiring both properties and erecting upon them a new building of twenty-six storeys and letting some parts of the new building to the Crown for the use of the Canadian National Railways and other parts thereof to the Department of Customs and Excise, which was in need of new offices.

Accordingly, the appellant Forgie acquired an option of purchase over the Home Bank property, and entered into negotiations with the Crown through the Minister of Railways and Canals for the purchase of the Corner property on the footing that he would build upon such property and on the Home Bank property the proposed new building, and when the building was completed would lease the ground floor and three other floors to the Crown for the use of the Canadian National Railways. At the same time, the appellant Forgie entered into negotiations with the Minister of Public Works with a view to the grant to the Crown for the use of the Department of Customs and Excise of a lease of five other floors of the proposed new building. It was, of course, obvious that the financing of the proposed scheme would be rendered easier if these last mentioned negotiations could be brought to a successful issue.

The first proposal of the appellant Forgie to the Minister of Railways and Canals was in May, 1925, and came to nothing, but a deposit of $25,000 made in connection with such proposal was treated afterwards as the deposit made under the offer of July 27, 1925, hereinafter mentioned.

In July, 1925, as the result of further negotiations, the following four documents came into existence—namely: (1.) a written offer dated July 27, 1925, for the purchase of the Corner property made by the appellant Forgie to His Majesty the King represented by the Minister of Railways and Canals for Canada; (2.) a report upon such offer dated July 27, 1925, by the same Minister to the Governor-General in Council; (3.) draft of a lease to carry out part of the terms of the offer; and (4.) an Order in Council dated July 29, 1925, authorizing a sale of the Corner property in accordance with the terms of the offer.

It is in their Lordships' opinion obvious, having regard to the dates of these documents, that the offer of July 27, 1925, embodied terms which, as the result of the negotiations, were then acceptable both to the appellant Forgie and the Minister of Railways and Canals.

The offer begins by the appellant Forgie offering to purchase the Corner property for $1,250,000 cash. It then states that a deposit of $25,000 is made by the purchaser on account of the price, in case of and upon acceptance of the offer, but otherwise to be returned without interest (this being the sum of $25,000 previously deposited as already explained). It then provides for payment of the balance of the purchase price "at such time as possession of the said premises be given to the undersigned" (i.e., the appellant Forgie) "not later than September 15, 1925," and for apportionment of outgoings "to date of completion of sale."

After some provisions as to title not material to be referred to, the offer proceeds as follows:—

"It is to be further understood that the undersigned agrees that upon his obtaining possession of the said lands hereinbefore referred to, on or before September 15, 1925, that he, the undersigned, will immediately proceed with the erection of a twenty-six storey modern fire-proof office building on the said lands and on the lands (formerly known as the Home Bank of Canada, head office site), now owned by the undersigned, and adjoining immediately to the west thereof, on King Street, and complete and have ready the said office building for occupancy by His Majesty as tenant under lease as hereinafter provided, not later than October 25, 1926, subject to the usual delays that may happen in the construction of said office building beyond the control of the undersigned, the contractors, builders and architects and as evidence of such undertaking of completion of said office building within the time above specified, the undersigned will furnish His Majesty, represented as aforesaid, with a certified copy of the contractor's (constructing the said office building) bond guaranteeing the completion of the said building within the time specified; the said office building to be constructed in accordance with the plans, details and specifications prepared and to be prepared by Eustace G. Bird, architect of the City of Toronto, and which said plans shall be subject to the approval, in so far as space in the said office building to be occupied by His Majesty as tenant under lease hereinafter referred to, by a representative or representatives of and to be named by the Canadian National Railways.

Further provided that His Majesty, represented as aforesaid, shall execute a lease for the renting space of the ground floor and of the next three typical floors of the said office building for a term of thirty years from October 25, 1926" [the amount of rentals was here provided for], "the lease to be executed by His Majesty, represented as aforesaid to be in and to embody the exact terms and provisions as in draft lease hereto annexed, marked A, set out, it being understood that in the event of any inconsistency between the above set out terms and provisions of the lease to be executed and the terms and provisions of the draft lease hereto annexed marked A, that the terms and provisions of the said draft lease hereto annexed marked A shall prevail and govern in the lease to be executed under the provisions of this offer of purchase.

That notwithstanding anything in this offer of purchase it is understood that in the discretion of His Majesty it may be a condition of the instrument of conveyance from His Majesty to the undersigned of the said lands in the terms of the said instrument that the title in and to the said lands by the said instrument to vest in the undersigned only upon the execution and delivery by the undersigned of the lease, hereinbefore referred to, to His Majesty, represented as aforesaid, and the due furnishing of the bond by the undersigned as under the terms and provisions of said draft lease provided for.

This offer of purchase, if accepted by Order of His Excellency the Governor-General in Council, shall constitute a binding contract of purchase and sale, subject to all the terms and provisions thereof and which contract shall enure to the benefit of the undersigned, his heirs, executors, administrators and assigns and to the benefit of His Majesty, His Successors and Assigns."

A draft lease was sent to the Minister with the offer embodying the terms upon which the ground floor and three other floors of the proposed new building were to be let to the Crown. The draft was expressed to be between the first appellants as lessors (to whom the appellant Forgie had assigned or was bound to assign all his interest in the transaction) and "His Majesty the King acting on behalf of the Dominion of Canada and therein represented by the Minister of Railways and Canals and on the authority of an Order in Council dated the day of , 1925, hereinafter called the lessee." The term of the lease was expressed to be thirty years from October 25, 1926, the date fixed in the offer for the completion of the new building, and the draft further provided for the payment of the rents therein specified and for all other necessary terms.

The report of the Minister to the Governor-General in Council is recited in full in the Order in Council, though the report itself was not produced in the course of the proceedings. As appears from such recital, the report sets out the title of the Crown to the Corner property, refers to the appellant Forgie's offer of July 27, 1925, and intimates that "the Minister accepted said offer of purchase subject to the approval and authority of Your Excellency in Council given on or before July 29, 1925." It then states "that in the main the said offer of purchase accepted as aforesaid sets out in effect as follows." The main provisions of the offer follow. The report then calls attention to the fact that the directors of the Canadian National Railways had (as the fact was) approved the proposal and that a draft lease (referring to the draft of which mention has already been made) in accordance with the offer had been prepared and that a copy of it was attached to the report.

The Order in Council recited the Minister's report at length, and stated that the Minister submitted the same, and upon the advice of the Deputy Minister of Railways and Canals recommended that authority be given for the acceptance of the said offer and for the sale and transfer of the premises by His Majesty to the purchaser, the transfer by its own terms only to vest title of the premises in the purchaser upon the execution and delivery of the lease hereinbefore referred to, and such transfer to be in form to be approved by the Department of Justice. The foregoing recommendation was then concurred in, and the Order in Council was approved by His Excellency the Governor-General in due course.

The appellant Forgie produced at the trial a certified copy of the Order in Council which he said he had received, but he could not say whether he received it on the day on which the Order in Council was made or on a later day, and he could not recollect whether or not he received any covering letter with it. Except to this extent there was no evidence of any formal intimation to the appellant that his offer was accepted.

The Canadian National Railways vacated the Corner property on Saturday, September 19, 1925, but no tender of possession was ever made to the appellants or either of them.

On September 16, 1925, the appellant had applied for and obtained an extension of time for completion. Subsequently, he made six further applications for an extension of time for completion, each one of which was acceded to, the final extension being until December 30, 1925.

On the occasion of each extension the Minister or the Deputy Minister wrote to the appellant Forgie a letter referring to the offer of July 27, 1925, and "the acceptance thereof," and advising him that a further extension of time to the date specified was given "but without prejudice on the part of His Majesty as to and without waiver on the part of His Majesty of any of His rights reservations or remedies under and as provided for by the said contract should you fail to perform and carry out within the hereby extended period all the covenants and conditions which on your part under and as provided by the said contract were to be performed and carried out within the original period thereunder provided."

An application to extend the time for the completion of the new building had been made on September 30, 1925, but had been refused. On October 5, 1925, draft letters patent embodying the conveyance of the Corner property from the Crown to the appellant Forgie had been sent to the latter. In the meantime, also, the negotiations with the Minister of Public Works were continuing but did not reach finality till February 1, 1926, when an Order in Council was passed sanctioning on the recommendation of that Minister the grant of a lease of five floors in the proposed new building by the first appellants to the Crown for ten years from the date of occupation at an annual rent of $110,000.

The appellant Forgie gave evidence to the effect that the delay in obtaining the last mentioned Order in Council was due in part at any rate to the fact that a general election took place in Canada in the autumn of 1925, and that "we were requested to allow the matter to stand until after the election as it was not desired to bring the matter into the political field." His evidence in this respect does not appear to have been cross-examined to or contradicted, and was accepted in the Exchequer Court. No doubt, as the learned judge of the Exchequer Court thought, in the delay in getting through this matter of the lease to the Department of Customs and Excise is to be found a principal reason for the several applications made for the extension of the time for the completion of the contract for purchase.

On December 29, 1925, the day before the expiration of the last extended period for the completion of the purchase, the appellant Forgie applied by letter for a further extension until January 31, 1926. This application received no acknowledgment or answer.

The appellant Forgie stated in the box that he saw Mr. Graham, the Minister of Railways and Canals, in January,

1926. His account of what took place was as follows: "I had a conversation with Mr. Graham about this matter. The conversation at the outset was purely personal. I told him I had written for this extension and was very much exercised over the fact that I had not heard about it, and he said: 'I do not see what cause you have to worry, Forgie, I have not cancelled your contract.' I said: 'I am very glad to hear that but I would like to have it in writing.' He said, 'There is no necessity to worry—the matter stands as it did.'" This evidence was not shaken in cross-examination, in the course of which the witness, when asked whether he discussed with Mr. Graham the fact that he had not yet got through the matter of the lease to the Department of Customs and Excise, answered, "We discussed the whole thing from beginning to end." Mr. Graham admitted that he knew what was taking place with regard to the proposed lease to the other Department, but he also said, "I have no recollection of having a conversation with Mr. Forgie, and if he seriously says that I had I will not dispute it, but if he makes a suggestion that this contract would be extended I absolutely deny that."

The Courts below do not appear to have expressed any view as to the proper conclusion of fact to be drawn from the evidence as to this interview, but if such an interview did take place, it affords some explanation of the absence of an answer to the application of December 29, 1925, which absence is otherwise unexplained.

On February 3, 1926, the appellant Forgie wrote to Mr. Graham that he was prepared to complete on February 10, 1926.

On February 8, 1926, Mr. Graham replied as follows: "In reply to your letter of February 3, permit me to say that you made an agreement to pay for property on the corner of King and Yonge Streets, Toronto, on a certain date. Failing to implement your agreement on that date, several extensions of time were given your clients, but in every instance they failed to make payment on the date mentioned. Negotiations were carried on by the Canadian National

Railways, and whatever failure there has been has been the fault of those you represent, not the fault of either the Government or the Canadian National Railways."

Subsequently, on February 12, 1926, Mr. Graham wrote to the appellant Forgie: "There will be no more extensions, and I will oppose to the limit any application you make for a fiat" (i.e., a fiat to enable proceedings to be taken against the Crown).

A claim for compensation or damages was thereafter made by the appellants and was referred by the acting Minister of Railways and Canals to the Exchequer Court.

The learned judge in the Exchequer Court gave judgment for the appellants, holding them entitled to damages but reserving the ascertainment of the amount of such damages. In the learned judge's opinion there was a valid enforceable contract in respect of which time had not originally been and was not subsequently made of the essence of the contract, so that the Crown had no right in February, 1926, to treat it as at an end.

The Supreme Court unanimously allowed the appeal and dismissed the claim with costs, but ordered the return of the deposit of $25,000 which had been retained by the Crown.

The judgment of the Court was delivered by Smith J. The learned judge held that there was no written acceptance of his offer communicated to the appellant Forgie by any one having authority to communicate such acceptance, and that the Order in Council was not itself an acceptance of the offer, and therefore that there was no contract, and moreover, that the requirements of s. 15 of the Department of Railways and Canals Act (R. S. Can., 1906, c. 35) had not been complied with, so that there could be no binding contract. The learned judge further held that even if there was a contract, time for completion had by the several extensions been made of the essence of the contract and that the Crown was entitled to treat the contract as at an end.

Their Lordships think that if any notification of acceptance of the offer was necessary, the only possible inference upon the evidence is that there was a notification of acceptance by the sending to the appellant Forgie of a certified copy of the Order in Council. But in fact, in their Lordships' opinion, there was not upon the true construction of the contract any need for a notification of acceptance. The language of the offer is: "This offer of purchase, if accepted by order of His Excellency the Governor-General in Council, shall constitute a binding contract of purchase and sale subject to all the terms and provisions thereof." This language is not the language of precision, but the meaning which can most naturally be and ought, in their Lordships' opinion, to be attributed to it, is that the offer shall be deemed to have been accepted when the necessary Order in Council has been made.

Upon this view of the matter there was a contract without any intimation of acceptance so soon as the Order in Council was made.

The question remains whether such a contract is binding, having regard to s. 15 of the Department of Railways and Canals Act (R. S. Can., 1906, c. 35).

That section is in the following terms: "15. No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose: Provided that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for His Majesty."

Now the Corner property was originally acquired by the Crown under the Expropriation Act (R. S. Can., 1906, c. 145), and therefore under s. 34 of that Act was vested in His Majesty, and when not required might be sold or disposed of under the authority of the Governor-General in Council. Sect. 4 of the Public Lands Grants Act (R. S. Can., 1906, c. 57) does not apply.

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Prima facie therefore the matter was not under the control or direction of the Minister of Railways and Canals, but the property had since its expropriation been occupied for the purposes of his Department, the offer was addressed to His Majesty as represented by such Minister, and it was one of the terms of the sale that His Majesty represented by such Minister should take a lease of certain floors in the proposed new building. In these circumstances it must, their Lordships think, be taken that, having regard to s. 3, sub-s. 2, and s. 7 of the Department of Railways and Canals Act, and to the decision of their Lordships upon the appeal in respect of the validity of the reference, the matter was under the control or direction of the Minister of Railways and Canals and that his consent was required.

That he did consent cannot be doubted, as in his report to the Committee of the Privy Council upon the offer of July 27, 1925, he stated that he had accepted such offer subject to the approval and authority of the Governor-General in Council.

In these circumstances did s. 15 apply to the contract in question ? Their Lordships are of opinion that it did not. It is to be observed that the section does not say that every contract in order to be binding must be in writing, but only that no deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding unless it is signed and countersigned by certain specified persons. Of the four things mentioned each one except " contract " must necessarily be something in writing. So long ago as in 1898 the Supreme Court of Canada in *Reg.* v. *Henderson* (1) held that the section did not apply where the contract was not a written one. Their Lordships think that that conclusion was correct. They think that so far as " contract " is concerned the section has no application except where the contract is embodied in an instrument or instruments in writing intended to be signed by some one on behalf of the Crown. Here there was no such intention. On the construction of the offer which their Lordships adopt nothing further in writing signed by any of the parties was required. The making of the Order in Council was of itself sufficient to convert the offer into a binding contract.

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(1) 28 Can. S. C. R. 425.

Their Lordships are therefore of opinion that there was constituted in the events which happened a valid contract in the terms of the offer of July 27, 1925, binding upon the Crown.

The time fixed by the contract for the completion of the purchase was not expressly made of the essence of the contract, and in their Lordships' opinion neither the language of the contract, the nature of the property, nor the circumstances of the case justify the implication of any such condition as one of the original terms of the contract.

The extensions of time for completion given from time to time are not consistent with the parties regarding the time fixed for completion as of the essence of the contract, nor can such extensions be treated as having the effect of a notice making time of the essence of the contract. The effect of each extension was merely to substitute the altered date for the original date. Now the Crown, apart from the extensions given, did not in any way call upon the appellants to complete within a fixed time, so as to give rise to a right on the part of the Crown to treat time as of the essence and the contract as at an end.

To meet this difficulty an argument was addressed to their Lordships on behalf of the Crown which was not developed in either of the Courts below, and upon which therefore their Lordships have not had the assistance of the learned judges in the Courts below.

It was said that the rule with regard to time not being of the essence of the contract was an equitable rule applied originally by a Court of equity only where it had jurisdiction to enforce and where the case was but for the time element a proper one for enforcing specific performance, and that the statutory extension of the rule to all Courts in Ontario (it being Ontario law which governs the present case) by s. 17, sub-s. 7, of the Ontario Judicature Act, 1881, subsequently reproduced in s. 14 of the Mercantile Law Amendment Act

(R. S. Ont., 1927, c. 161), is an extension which makes the rule applicable only in circumstances where specific performance would have been enforced in equity.

Further, it was urged (1.) that specific performance could never have been ordered against the Crown and that, therefore, apart from the statute, the rule could never have been made applicable against the Crown, and (2.) that in any case the statutory provisions extending the operation of the rule do not bind the Crown, which is not expressly named therein.

The circumstances in which the rule was applied in equity were the circumstances in which equity had jurisdiction to grant and would grant specific performance, but to state this is only to state that equity could apply its own rule only where it had jurisdiction. The rule itself, however, is a rule of substance which ought to be applied wherever the circumstances (apart from the status of the parties) are such that a Court of equity would have applied it.

It is no doubt true that an operative order for specific performance cannot be made against the Crown. In fact, no order can be made against the Crown in the sense in which it can be made against the subject, but under the Petition of Right Act (R. S. Can., 1906, c. 142), s. 8, there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it.

It is, in their Lordships' opinion, too narrow a view to treat the applicability of the rule as limited by reason of the status of the Crown. In the present case their Lordships think that the circumstances are such as would have justified an order for specific performance by a Court of equity, had the contest been one between two subjects.

What, then, is the effect of the statutory provision, first as between subject and subject, and secondly as between subject and the Crown?

Sect. 14 of the Mercantile Law Amendment Act (R. S. Ont., 1927, c. 161), the provisions of which have been operative at all times material to this case, provides: "Stipulations in contracts as to time or otherwise which would not before the passing of the Ontario Judicature Act, 1881, have been deemed to be or to have become of the essence of such contract in a Court of equity shall receive in all Courts the same construction and effect as they would prior to the passing of that Act have received in equity." Whatever be the proper construction to be applied to this enactment, their Lordships are satisfied it would have applied to the present case had the contract here been between subject and subject.

Is the Crown bound by the enactment? Their Lordships are of opinion that it is. Under the provisions of the Interpretation Act (R. S. Ont., 1927, c. 1), s. 10, no Act shall affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The expression "the rights of His Majesty" in this context means, in their Lordships' view, the accrued rights of His Majesty, and does not cover mere possibilities such as rights which, but for the alteration made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract. Upon this view of the matter the statutory provision operates in the present case.

The arguments of the respondent as to the special position of the Crown therefore fail on all points.

It follows that in their Lordships' opinion the appeal should be allowed and the judgment of the Supreme Court, except so far as it orders a return of the deposit, should be reversed, and the judgment of the Exchequer Court should be restored, and their Lordships will humbly advise His Majesty accordingly. The appellants will have their costs here and below.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1933 May 25.

ANGOSTURA BITTERS (DR. J. G. B. SIEGERT AND SONS), LIMITED . } APPELLANTS;

AND

KERR AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Company—Reserve Fund—Reserve Fund created by Memorandum of Association—Fund for Benefit of Preference Shareholders—Use of Fund for General Purposes—Articles of Association.

By the memorandum of association of a company—after a dividend of 8 per cent. per annum had been paid on the preference shares thereby created, 10 per cent. of the profits of each year were to be set aside and accumulated as a reserve fund until it amounted to 50,000*l.* invested outside the business; the preference shareholders in a winding-up were to have priority as to return of capital; and the above provisions might be modified in accordance with clause 54 of the articles of association, but not otherwise. The memorandum was silent as to the purposes for which the reserve fund might be applied.

Article 119 of the articles of association authorized the directors to set aside out of the profits a reserve fund for specified purposes and such other purposes as the directors in their absolute discretion thought conducive to the interests of the company, and provided that the reserve fund created under the memorandum of association was to be kept invested outside the business "until required for any of the above purposes":—

Held, that article 119 did not empower the directors to apply to the purposes therein mentioned the reserve fund created by the memorandum, as that fund was created for the benefit and security of the preference shareholders, and the provisions of the memorandum with regard to it were neither ambiguous nor in need of being supplemented.

Judgment affirmed.

APPEAL (No. 58 of 1932) from a judgment of the Supreme Court of Trinidad and Tobago (January 8, 1932).

The appellant company was incorporated under the Companies Ordinance, 1913–1914, of Trinidad and Tobago. It was agreed that the material provisions of the Ordinance did not differ from English company law and that those principles applied to the determination of the appeal.

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* *Present:* LORD MERRIVALE, LORD ALNESS, and SIR GEORGE LOWNDES.

The appeal arose out of an originating summons in the Supreme Court of the Colony, and was from so much of the judgment of Belcher C.J. as held that it was ultra vires for the directors to apply the reserve fund of 50,000*l.* created under the memorandum of association for the purposes referred to in article 119 (14.) of the articles of association.

The material provisions of the memorandum and articles of association appear from the judgment of the Judicial Committee.

1933. March 30. *Topham K.C.* and *C. W. Turner* for the appellants.

Sir Gerald Hurst K.C. and *R. H. Hodge* for the respondents.

In addition to cases mentioned in the judgment of the Board reference was made to *Ashbury* v. *Watson* (1); *Andrews* v. *Gas Meter Co.* (2); and *In re Welsbach Incandescent Gas Light Co.* (3)

May 25. The judgment of their Lordships was delivered by

SIR GEORGE LOWNDES. This appeal arises out of an originating summons taken out in the Supreme Court of Trinidad and Tobago for the friendly determination of certain questions affecting the rights of holders of preference shares in the appellant company.

When it first came on for hearing before the Board, only the company appeared, and it was adjourned in order that the preference shareholders might be represented, as is now the case. It will be convenient to refer to them in this judgment as the respondents. The interests of the ordinary shareholders, whose special representative does not appear, are identical with those of the appellants.

Three questions were submitted for the determination of the Court, of which the third is alone the subject of the appeal. It is in the following terms: "(3.)—(*a*) Is it intra vires of the directors of the company to use and dispose of the said reserve fund of 50,000*l.* for all or any of the purposes set out in sub-s. 14 of clause 119 of the articles of association of the company ? (*b*) If yes, is the company under any obligation to make up any deficiency arising from such user and disposal ? "

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(1) (1884) 28 Ch. D. 56, 62, 63; (1885) 30 Ch. D. 376, 385.

(2) [1897] 1 Ch. 361, 369.

(3) [1904] 1 Ch. 87, 96.

The reserve fund in question was constituted under clause 5 of the memorandum of association, which is set out below :

" The share capital of the company is 170,000*l.*, divided into 85,000 participating preference shares of 1*l.* each, and 85,000 ordinary shares of 1*l.* each. Subject as hereinafter provided, the rights following shall be attached to the participating preference shares aforesaid :—

(1.) The holders of the said participating preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of eight per cent. per annum on the capital for the time being paid up thereon, and after payment of such dividend 10 per cent. of the profits of each year shall be set aside and accumulated as a reserve fund until it amounts to 50,000*l.* and after setting aside such 10 per cent. and after the holders of the ordinary shares shall have received a non-cumulative dividend of eight per cent. per annum on the amount for the time being paid up on their ordinary shares the holders of the preference shares shall be entitled to participate equally with the holders of the ordinary shares in any surplus divisible profits of the year until the dividend on the preference shares for such year amounts to ten per cent. per annum and the holders of the ordinary shares shall then be entitled to the remainder of such profits.

(2.) The holders of the said participating preference shares shall in a winding-up have priority as to return of capital over all other shares in the capital for the time being of the company but shall not have any further right to participate in profits or assets.

(3.) Any reserve fund formed under the provisions hereinbefore contained shall be invested outside the company's business.

(4.) The right hereby attached to the said participating preference shares (including the provisions hereinbefore contained as to the reserve fund) may be modified in accordance with clause 54 of the accompanying articles of association but not otherwise and that clause and also clause 155 of the said articles shall be deemed to be incorporated herein and have effect accordingly.

(5.) Subject as aforesaid shares created upon an increase of capital may be divided into different classes and may have attached thereto respectively such preferential and qualified deferred or special rights privileges and conditions as may be determined."

The company is incorporated under the Companies Ordinance, 1913–1914, of Trinidad and Tobago, but it is agreed that nothing turns on the precise terms of this Ordinance, and that the question before the Board falls to be determined in accordance with the principles of the English company law.

The provision of a reserve fund is not one of the statutory requirements of a company's memorandum, and it is, no doubt, unusual to find such prominence given to it. The only reason for this, in their Lordships' opinion, is that the framers intended it to be regarded as part of the charter of the company, and as holding out special attractions to the subscribers of preference shares.

The summons was heard by the Chief Justice, whose answer to question 3 (*a*) was in the negative. No answer therefore was required to 3 (*b*). The company has appealed to His Majesty in Council and seeks to have the decision of the Chief Justice on this question reversed.

It is not disputed before the Board that the constitution of this special reserve fund was part of the rights of the respondents, but it is said that the memorandum is silent as to the purposes to which the fund is to be applied : that this is provided for by article 119 (14.) of the articles of association : and that reading the two together it should be held that the company has the powers which it claims.

Article 119 (14.) empowers the directors of the company—"to set aside out of the profits of the company such sums (in addition to the sums provided by article 5, sub-section (1.) of the memorandum of association to be set aside as the reserve fund therein mentioned) as they think proper as a reserve

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fund to meet contingencies or for special dividends or for repairing improving and maintaining any of the property of the company and for such other purposes as the directors shall in their absolute discretion think conducive to the interests of the company; and to invest the several sums so set aside both under article 5 sub-section (1.) of the memorandum of association and under this article upon such investments (other than shares of the company) as they may think fit, and from time to time to vary such investments. The reserve fund to be set aside under article 5 sub-section (1.) of the memorandum of association shall be kept invested outside the business until required for any of the above purposes." The words relied on by the appellants in support of the above contentions are "until required for any of the above purposes," which, it is said, should be read as providing that the fund in question may be applied to any of the purposes mentioned.

The learned Chief Justice thought it clear upon the terms of the memorandum that this fund was to be created for the benefit and security of the respondents, and that to accede to the contention of the appellants would be wholly destructive of this object. Under these circumstances he held it to be in accordance with a well established principle that the memorandum must prevail.

Before their Lordships it has been argued that there is no such principle; and that, except in respect of such matters as must by statute be provided for by the memorandum, it is not to be regarded as the dominant document, but is to be read in conjunction with the articles: *Harrison* v. *Mexican Ry. Co.* (1); *Anderson's Case* (2); *Guinness* v. *Land Corporation of Ireland* (3); *In re South Durham Brewery Co.* (4) Their Lordships agree that in such cases the two documents must be read together at all events so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum, or to supplement it upon any matter as to which it is silent.

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(1) (1875) L. R. 19 Eq. 358.

(2) (1877) 7 Ch. D. 75.

(3) (1882) 22 Ch. D. 349.

(4) (1885) 31 Ch. D. 261.

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They find themselves, however, in agreement with the learned Chief Justice as to the object for which this special reserve fund was to be created—namely, for the benefit and protection of the respondents, and they think that this object would be nullified if the fund could be applied, like any ordinary reserve fund, for the benefit of the company generally. There is not, in their Lordships' view, any ambiguity in the terms of clause 5 of the memorandum which requires explanation, nor any lacuna which requires filling in, and it is clear by sub-clause 4 that the provisions with regard to this fund can only be modified by the particular procedure there referred to.

Under these circumstances, their Lordships are unable to read the two documents as giving the appellants the power they claim. What exactly the reference in article 119 (14.) to some time when this special fund may be "required for any of the above purposes" means, it is not easy to say. It may contemplate some modification of the provisions of the memorandum, to be made in the authorized way, which would allow of the application of the fund to some one or other of the purposes referred to; it may have been thought by the draftsman (their Lordships do not say rightly) that it could be utilized in a lean year for payment of the preference dividend; or the words may have crept in per incuriam. Whatever the true explanation may be, their Lordships are unable to hold, in view of the terms of clause 5 of the memorandum, that the company has the wide powers which are claimed for it in respect of the fund, and they think that question 3 (*a*) was rightly answered in the Supreme Court.

They will therefore humbly advise His Majesty that this appeal should be dismissed. In view of the arrangement made between the parties, no order as to costs will be necessary.

Solicitors for both parties: *Maples, Teesdale & Co.*

[PRIVY COUNCIL.]

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In re BENEFICES OF BOLTON LE MOORS, ST. PAUL, CHRIST CHURCH, AND EMMANUEL.

APPEAL UNDER THE UNION OF BENEFICES MEASURE, 1923.

Ecclesiastical Law—Union of Benefices—Application of Surplus Revenue—Report of Commissioners of Inquiry—Union of Benefices Measure, 1923 [14 *&* 15 *Geo.* 5, *No.* 2], *s.* 2, *sub-s.* 6; *s.* 15.

Where a scheme under the Union of Benefices Measure, 1923, includes a recommendation by the Ecclesiastical Commissioners under s. 15 that surplus revenue of the united benefice shall be applied to the spiritual needs of another benefice in the diocese, it is not fatal to the validity of the scheme that the commissioners of inquiry while reporting in its favour have stated that apart from the proposed diversion of surplus revenue—a matter beyond their cognizance—they would have found it difficult to justify. The report of the commissioners can be regarded as a recognition and fulfilment of the duty imposed upon them by s. 2, sub-s. 6, of the Measure to have regard to the interests of religion in England generally.

Scheme affirmed.

APPEAL under the Union of Benefices Measure, 1923, referred to the Judicial Committee under s. 10, sub-s. 5, of the Measure.

The appeal was from a scheme under the above Measure for the union of certain benefices in the town of Bolton, in the diocese of Manchester.

The facts appear from the judgment of the Judicial Committee.

1933. May 5. *J. W. Stansfield* for the appellants.

F. H. L. Errington for the respondents.

May 30. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This is an appeal to His Majesty in Council against a scheme framed by the Ecclesiastical Commissioners under the powers of the Union of Benefices Measure, 1923.

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* *Present:* LORD BLANESBURGH, SIR LANCELOT SANDERSON, and SIR GEORGE LOWNDES.

Under its formal description the scheme is one for the Union of (1.) the benefice of Bolton le Moors, Saint Paul, with part of the benefice of Bolton le Moors, Christ Church, and (2.) the benefice of Bolton le Moors, Emmanuel, with the remaining part of the said benefice of Bolton le Moors, Christ Church, in the county of Lancaster and diocese of Manchester. More aptly it may with sufficient accuracy for present purposes be described as a scheme for the division of the parish of Christ Church in Bolton between the two adjoining parishes of St. Paul and Emmanuel and for the supersession of Christ Church as a separate parish.

The appellants are three members of the Parochial Church Council of Christ Church. They represent the whole Council in their opposition to the scheme.

The three parishes adjoin and they are situate in or near the centre of the town of Bolton. Christ Church was formed in 1844, partly out of Emmanuel. In 1866 St. Paul was constituted as a separate district and to the new parish there was transferred a considerable portion of the original Christ Church area. Since that year the three parishes have in the matter of boundaries remained unaltered. They are none of them very large. Christ Church in area is particularly small. Of the three, Emmanuel, with its 500 acres and a population of about 7400, is the most extensive. Only a very small addition to it is proposed by the scheme. St. Paul has an area of 220 acres with a population of over 3000. Christ Church comprises 45 acres only, with no more than half of the area residential. It has a population of just over 2800, of whom many are Roman Catholics.

The rearrangements of 1844 and 1866 were doubtless meant to provide for the needs of an expanding population then in prospect. It is, however, now characteristic of all three parishes that the population has for many years been stationary with a tendency, especially strong in the cases of St. Paul and Emmanuel, to decline. In Bolton, as in other large towns, there is stated to be a steady drift from the centre towards the outskirts and the urban area is continually declining. As a result the existing church accommodation of the three parishes has become much more than adequate: it may almost be described as redundant. While the church of St. Paul has seating accommodation for 1175 persons and Emmanuel for 640, the normal Sunday congregation at St. Paul is said to number about 250, and that at Emmanuel from 250 to 300. At Christ Church, with seating accommodation for 500, the normal attendance at matins on Sundays is 50; at evensong 70 to 80; at early communion 20. The church of Christ Church stands midway between the churches of St. Paul and Emmanuel at a distance of about 700 yards from each. Both Emmanuel and St. Paul churches are thus within easy reach of every part of the parish of Christ Church. There is apparently no extreme of difference between the services at any of the three churches, but those at St. Paul are said to be definitely Protestant in character. There are other churches at no great distance. On the other hand the spiritual needs of large populations in new districts outside Bolton are practically unprovided for.

Emmanuel has its own vicarage. St. Paul has none. As a vicarage fund the Ecclesiastical Commissioners hold a sum of 1500*l.*, the income of which is enjoyed by the vicar. There is a vicarage at Christ Church. It is attached to the church, which was originally a Primitive Methodist chapel and is stated to be of no architectural interest. The vicarage has no garden, and is otherwise inconvenient. It is proposed by the scheme that the church shall be pulled down and the site with the adjoining vicarage be sold. To this proposal, as a detail of the scheme, no objection is taken.

Christ Church has its own church schools. So too Emmanuel. At one time St. Paul had also its own schools, but these being deficient in educational requirements have been closed. The Christ Church schools are in that area of the parish which under the scheme is transferred to St. Paul. It is a provision of the scheme that the Christ Church schools shall become the schools of the extended parish of St. Paul.

St. Paul has a net annual income of approximately 344*l.*, together with 67*l.* 10*s.* per annum from the parsonage house fund already referred to. If only permanent endowment be considered the amount, apart from the 67*l.* 10*s.*, is 210*l.* only. The income of Emmanuel is approximately 400*l.*; permanent endowment 350*l.* The income of Christ Church is 400*l.*; permanent endowment 375*l.*

The Martyrs Memorial Trustees are the patrons of St. Paul; the vicar of Bolton is the patron of Emmanuel. The patronage of Christ Church is in the Crown and the Bishop of Manchester alternately. Both have agreed to the extinction of their patronage rights, so that the patrons of the existing benefices of St. Paul and Emmanuel may become patrons of the new extended benefices of St. Paul and Emmanuel respectively. By this concession on the part of the Crown and the Bishop difficulties on this matter foreseen by the Commissioners in their report have been adjusted as they desired.

It is with reference to these three parishes, as thus circumstanced, that the scheme is propounded. Under it the greater portion of the Christ Church area is transferred to St. Paul. As has already been said, only a small portion, and that conveniently contiguous, is transferred to Emmanuel. These two extended parishes retain their existing names: each will have its own church school, and each will be less inadequately endowed than at present. Under the scheme it is proposed that 200*l.* a year out of the endowment of Christ Church shall be transferred to the new St. Paul parish and 100*l.* a year to the new Emmanuel parish, bringing the annual income of the one up to 544*l.*, with 67*l.* 10*s.* in lieu of a parsonage house, and the annual income of the other up to 500*l.* With regard to the remaining endowments of Christ Church the scheme proposes that the net proceeds of the sale of the church site and parsonage house shall be held and accumulated by the Ecclesiastical Commissioners for and towards the purchase of a suitable site and the erection of a new church for a district to be formed in or near Bolton and for or towards the endowment of such church and district and the provision of a parsonage house in connection therewith. It is further proposed that the residue of the annual endowment of Christ Church amounting approximately to 88*l.* shall be held and accumulated towards the endowment of the same new district. The scheme has the support not only of the Bishop of the Diocese, but of the parochial church councils and vicars of St. Paul and Emmanuel and the patrons of all three benefices. It is opposed only by the Parochial Church Council representing, it must be agreed, the congregation of Christ Church.

The case for that Council was presented to their Lordships with clearness and candour by Mr. J. W. Stansfield. It was rested on the admitted existence of an active church life in the parish of Christ Church. The living has been vacant for over eighteen months and the last vicar was, at the time of his resignation, advanced in years. Yet the parish has remained highly organized with its church school, Sunday school, mothers' union, boy scouts and girl guides. It has contributed generously to local charities and to missions. On Easter day there were 93 communicants at two celebrations. Their Lordships are greatly impressed by this record of Christ Church. In face of it they express the view with reluctance that the scheme is nevertheless just such a scheme as is contemplated by the Measure. It is true of almost every scheme thereunder that some individual or collective hardship attends the change. It seems to their Lordships that while in this case the hardship is, it may be hoped, only temporary, the advantages of the scheme are preponderant with a good prospect of being lasting. This is not a scheme affecting parishes with a long tradition of separate and unchanged independence upon which against similar schemes when put forward reliance is so frequently and so effectively placed. Within a period not remote the area covered by these three parishes has been twice apportioned to accord with contemporary need. Again, under existing conditions there is hardly room for three separate organizations in an area so small, while the endowments divided as they are have become inadequate for the appropriate support of any of the three incumbents. Their Lordships feel that the spiritual needs of a parish of such small extent as Christ Church should

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be amply and effectively met by its incorporation in the two adjoining parishes, and that there will be in the two united parishes, then not inadequately endowed, room for a fuller and more active life than has so far been possible in three. Nor are their Lordships insensible of the advantage to accrue to the large populations on the outskirts of Bolton at present totally unprovided for by the appropriation of the annual sum of 88*l*. towards provision for their spiritual needs.

Their Lordships, however, before expressing any final conclusion on the scheme must refer to and dispose of a question which arises upon a passage in the report of the inquiry commissioners to the Bishop: "There was some difference of opinion," they say, "between the Commissioners on the main question. It was recognized by all that if the needs of outlying parts of Bolton were not to be taken into account it would be difficult to justify any interference with Christ Church and Mr. McCann [one of the Commissioners] was of opinion that a sufficient case had not been made out. The other Commissioners, however, were in favour of recommending the proposed unions."

Now this statement must be read in connection with the Measure, the effect of which on this subject was expounded by Lord Tomlin in delivering the judgment of their Lordships in *In re Benefices of Great Massingham and Little Massingham.* (1) In that judgment Lord Tomlin pointed out that there is no statement in the Measure of the principles which are to govern the union of benefices except in the provision in s. 2, sub-s. 6, to the effect that the commissioners appointed to inquire and report shall have full regard to the circumstances and interests of the parishes affected by their inquiry, and that it shall be their duty to consider the matters under inquiry "in their relation to such circumstances and interests and to the interests of religion in England generally," and he added that where a union of benefices is proposed the question of the diversion of surplus revenue seems under s. 15 of the Measure to be for the consideration of the Ecclesiastical Commissioners not as one of the factors for determining whether there shall be union, but as a point for examination after a conclusion in favour of union has been reached.

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(1) [1931] A. C. 328, 331.

When to that statement of Lord Tomlin's is added the further consideration that a report to the Bishop by the commissioners against a scheme is decisive and final the question becomes important whether this avowal by the commissioners that apart from their recommended diversion of surplus revenue—a matter beyond their cognizance—they would have found it difficult to justify any interference with Christ Church, should not have effect given to it in their Lordships' report to His Majesty. Having once reached that conclusion were not the commissioners in duty bound, if properly advised, to report against the scheme ? Must not their Lordships support a conclusion of the commissioners which, if expressed as it should have been, would have been decisive against the scheme ?

After full consideration their Lordships are satisfied that they are not required to make to His Majesty a report which on the scheme as a whole would accord neither with their own views nor with those of the majority of the commissioners. The answer to the difficulty raised by the terms of the report is found they think in this, that it is as a whole that the scheme is recommended by the commissioners. True, it is a condition of the scheme going forward at all that, as a result, it is recommended by them. But their actual report to the Bishop is personal to himself, and No. 19 of the rules made under the Measure provides that it shall not be obligatory on the Bishop or the Ecclesiastical Commissioners to disclose it to any party to the inquiry or any other person. The fact that in these cases the report is usually and properly attached by the Ecclesiastical Commissioners to their answer in no way alters its character or prevents the Commissioners in a proper case from withholding it. In other words the report itself is not a document of title. It is the pronouncement therein for or against a scheme which is vital.

Their Lordships, however, need not pursue this matter further on these lines. They are relieved of difficulty in the present case by the consideration that while in this scheme the diversion of the surplus income of Christ Church must strictly be taken to result from the later action of the Ecclesiastical Commissioners, it follows the recommendation of the inquiry commissioners, and that recommendation in turn may be regarded as a recognition and fulfilment of the duty imposed upon them by the Measure to have regard to the interests of religion in England generally.

Their Lordships will accordingly report to His Majesty in Council that the scheme be affirmed.

Solicitors for appellants: *Russell & Russell.*

Solicitors for respondents: *Milles, Jennings White & Foster.*

[PRIVY COUNCIL.]

J. C.*
1933
May 15.

BELL TELEPHONE COMPANY OF CANADA . . . . APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS . RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railways—Jurisdiction of Railway Board—Highway Crossings—Subways—Removal of Public Utilities—Closing of Streets—Canadian National Montreal Terminals Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 12; *Dom.*)—*Expropriation Act* (*R. S. Can.*, 1927, *c.* 64), *s.* 3—*Railway Act* (*R. S. Can.*, 1927, *c.* 170, *as amended*), *ss.* 39, 256, 257—*Canadian National Railways Act* (*R. S. Can.*, 1927, *c.* 172), *s.* 17.

The Canadian National Montreal Terminals Act, 1929, did not displace the operation of the Railway Act in relation to the works which it authorized; while describing their essential features it left everything else to be worked out by the already existing statutory machinery available for the purpose.

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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Sect. 17 of the Canadian National Railways Act, upon its true construction, subjects the Company to the provisions of the Railway Act contained in the two groups of sections headed, " Crossings and junctions with other railways " (s. 252 to s. 254) and " Highway crossings " (s. 255 to s. 260), and excludes the powers given by s. 3 of the Expropriation Act.

Where the Railway Board, in the exercise of its powers under s. 256 or s. 257 of the Railway Act, orders the making of a subway in connection with a highway crossing, it has power under s. 39 to order that telephone plant and other public utilities thereby affected shall be moved by their respective owners and relayed.

Where the closing of streets is incidental to a scheme for dealing with a series of existing level crossings in a city the Railway Board, in making, on an application by the railway company and the city, an order under s. 257 of the Railway Act can include a direction to the city to close the streets, and consequently under s. 39 can direct that public utilities thereby affected shall be moved by their owners.

Judgment of the Supreme Court of Canada [1932] S. C. R. 222 affirmed.

CONSOLIDATED APPEALS (No. 61 of 1932) by special leave from eight judgments of the Supreme Court of Canada (March 1, 1932) affirming four orders of the Board of Railway Commissioners of Canada. (1)

The various appellants were the owners of plant and appliances for public utilities services laid or constructed in or on streets, which by orders of the Board of Railway Commissioners of Canada (hereinafter referred to as " the Railway Board ") were ordered to be carried in subways under railway lines. The appellants disputed the power of the Railway Board to order them respectively to move their plant and appliances. In the first seven appeals the Canadian National Railways were the respondents, and questions arose as to the effect of the Canadian National Montreal Terminals Act, 1929, and s. 17 of the Canadian National Railways Act (R. S. Can., 1927, c. 172) in addition to the Railway Act; in the eighth appeal the Toronto, Hamilton and Buffalo Railway Co. were the respondents, and the questions raised were only as to the effect of the Railway Act.

(1) An appeal by the City of Montreal by special leave from two of the orders of the Railway Board was heard together with the consolidated appeals, and raised questions dealt with thereby.

The judgments in the Supreme Court of Canada are reported at [1932] S. C. R. 222.

The facts, and the material statutory provisions, appear from the judgment of the Judicial Committee.

1933. March 31; April 3, 4, 6. *Geoffrion K.C.* for the appellants.

Tilley K.C. for the respondents.

May 15. The judgment of their Lordships was delivered by

Lord Macmillan. In these appeals the validity of four orders made by the Board of Railway Commissioners for Canada is challenged. Appeals Nos. 1, 3 and 5 arise out of an order of the Railway Board, No. 45,410 of September 16, 1930, relating to a subway in d'Argenson Street, Montreal; here the appellants are respectively: (*a*) the Bell Telephone Company of Canada; (*b*) the Montreal Light, Heat and Power Consolidated; and (*c*) the Montreal Tramways Co. and the Montreal Tramways Commission; the respondents are in each case the Canadian National Railways. Appeals Nos. 2, 4 and 6 arise out of an order of the Railway Board, No. 45,427 of September 9, 1930, relating to a subway in St. Antoine Street, Montreal, and the parties are again the same. The seventh appeal arises out of an order of the Railway Board, No. 46,083 of January 8, 1931, relating to a subway in St. Clair Avenue, Toronto, and in this case the Bell Telephone Co. are the only appellants, the Canadian National Railways being again the respondents. The eighth appeal arises out of an order of the Railway Board, No. 45,813 of November 14, 1930, relating to certain street works in Hamilton, Ontario. Here the Bell Telephone Co. are once more the appellants, but the respondents on this occasion are the Toronto, Hamilton and Buffalo Railway Co. and the Corporation of the City of Hamilton. These eight appeals were consolidated by the Order of His Majesty in Council of July 21, 1932, granting special leave to appeal. There is in addition before their Lordships a separate appeal in which two of the above mentioned orders of the Railway

Board, Nos. 45,410 and 45,427, relating respectively to the d'Argenson Street subway and the St. Antoine Street subway, are also called in question by the City of Montreal, which was granted special leave to appeal by Order in Council of November 10, 1932. This separate appeal was called on and argued along with the eight consolidated appeals.

The works to which the orders of the Railway Board relate involve alterations in the level of existing streets in or on which the appellants, who provide various public utility services, have laid or constructed ducts, mains, cables, posts, and other plant and appliances necessary for the purposes of their undertakings. The execution of the works consequently necessitates the removal of the appellants' plant and the replacing of it at an altered level. By the orders impugned the Railway Board has directed the appellants to do the necessary work of removing and relaying their plant, and the appellants dispute the jurisdiction of the Railway Board to pronounce such orders. There are points common to all the appeals, but there are special considerations applicable respectively to the group of Montreal appeals, the Toronto appeal, and the Hamilton appeal.

The appellants, other than the City of Montreal, applied for and were granted leave to appeal to the Supreme Court of Canada against the orders of the Railway Board. The Supreme Court unanimously dismissed the appeals. Their Lordships have now to consider whether the Supreme Court decided rightly in upholding the jurisdiction of the Railway Board to pronounce the orders in question.

Following the sequence of the appellants' argument, their Lordships will deal in the first place with the

ST. ANTOINE STREET SUBWAY, MONTREAL.

It appears from the statement of facts that the Canadian National Railway Co. some time ago prepared a comprehensive scheme for the readjustment and improvement of their terminal facilities in the City of Montreal. The Government obtained a report on the whole project from an eminent British engineer and thereafter an Act, 19–20 Geo. 5, c. 12, was passed, entitled the Canadian National Montreal Terminals Act, 1929, hereinafter referred to as "the Terminals Act."

Sect. 2 of this Act reads as follows: "2. The Governor in Council may provide for the construction and completion by the Canadian National Railway Company (hereinafter called 'the Company') of terminal stations and offices, local stations, station grounds, yards, tracks, terminal facilities, power houses, pipes, wires and conduits for any purpose, bridges, viaducts, tunnels, subways, branch and connecting lines and tracks, buildings and structures of every description and for any purpose, and improvements, works, plant, apparatus and appliances for the movement, handling or convenient accommodation of every kind of traffic, also street and highway diversions and widenings, new streets and highways, subway and overhead streets, and also approaches, lanes, alleyways, and other means of passage, with the right to acquire or to take under the provisions of section nine of this Act or otherwise lands and interests in lands for all such purposes, all on the Island of Montreal in the Province of Quebec, or on the mainland adjacent thereto, as shown generally on the plan or plans thereof to be from time to time approved by the Governor in Council under the provisions of section seven of this Act: the whole being hereinafter referred to as the 'said works,' and a short description whereof for the information of Parliament but not intended to be exhaustive, being set out in the schedule hereto."

Sect. 7 provides: "7. The general plan or plans of the said works and amendments or additions to such general plan at any time made shall, on the recommendation of the Minister of Railways and Canals, be subject to the approval of the Governor in Council. . . ."

The scheme included the erection of a new passenger station at Lagauchetière Street, where the railway company's line from the north emerges from the tunnel under Mount Royal, and the construction of elevated railway tracks connecting the new station with the existing railway system to the south. The first item in the schedule is "(*a*) central

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passenger terminal facilities," being the new passenger station, described as occupying an area bounded on four sides by existing streets, including St. Antoine Street on the south. The second item is "(*b*) viaduct and elevated railway . . . . crossing over existing streets," being the new line proceeding southwards from the new station, "with connections to existing railway facilities and Harbour Commissioners' trackage."

The railway company, as required by the Terminals Act, duly prepared a general plan of the works, which was submitted by the Minister of Railways and Canals to the Governor in Council with a recommendation that it be approved. On July 2, 1929, the Governor in Council approved of this general plan and of the construction by the railway company of the works indicated in red thereon, on the location sanctioned by the Minister, as also shown thereon in red.

The general plan showed the proposed viaduct and elevated railway, being item (*b*) in the schedule, proceeding southwards from the new station and crossing at right angles over St. Antoine Street, which runs east and west along the southern boundary of the new station site.

St. Antoine Street had not previously been crossed at this point by any railway on the level or otherwise, and it was necessary, in order to provide sufficient headroom under the proposed new overhead track, that the existing level of the street should be lowered for a length of about 500 feet. This involved a disturbance of the plant which the appellants had laid in or on the street at its existing level for the purpose of providing the public with telephone, gas and electricity and tramway services, and necessitated the removal of this plant and its replacement in or on the street at a lower level.

The railway company in the beginning of 1930 submitted to the Railway Board two general plans of the works, which included (inter alia) the construction of a subway in St. Antoine Street. These plans were approved by the Railway Board by Order No. 44,433 of March 13, 1930.

subject to the submission and approval of detailed plans. Thereafter the railway company, in April, 1930, forwarded to the Railway Board a detailed plan "showing proposed clearances in height and widths of roadways and sidewalks on St. Antoine Street," and requested the Railway Board's approval thereof. The application stated that copies of the plan were being served on, among others, the present appellants, and asked that the Railway Board should direct these parties to "move such of their facilities as are affected by the construction as and when requested to do so by the Chief Engineer, Operating Department, Canadian National Railways, all questions of cost to be reserved for further consideration by the Board."

On September 9, 1930, the Railway Board made the Order No. 45,427 now challenged, the text of which is as follows: "In the matter of the application of the Canadian National Railways, hereinafter called the 'applicants,' under s. 356 of the Railway Act for authority to construct a subway on St. Antoine Street, in the City of Montreal, as shown on general plan and profile No. YIA 31.10.4, dated August 16, 1930, on file with the Board under file No. 9437.319.13: Upon the report and recommendation of the Chief Engineer of the Board and reading the submission filed, the Board Orders:

1. That the applicants be, and they are hereby, authorized to construct a subway on St. Antoine Street, in the City of Montreal, Province of Quebec, as shown on the said general plan and profile on file with the Board under file No. 9437.319.13; detail plans of the proposed structure to be filed for the approval of an Engineer of the Board.

2. That the City of Montreal, the Montreal Light, Heat and Power Consolidated, the Montreal Tramways Co., the Bell Telephone Co. of Canada, the Electrical Commission of the City of Montreal, the Canadian Pacific Railway, Telegraph Department, the Dominion Electric Protection Co. and the Montreal Tramways Commission be, and they are hereby, directed to move such of their utilities as may be affected by the construction of the said subway, as and when required

to do so by the Chief Engineer, Operating Department, of the applicants.

3. That all questions of costs be reserved for further consideration by the Board.

(Sgd.) H. A. McKEOWN,
Chief Commissioner,
The Board of Railway Commissioners for Canada."

This order, it will be observed, purports to be made under s. 256 of the Railway Act (R. S. Can., 1927, c. 170, amended by the following statutes of Canada—1928, c. 43, 1929, c. 54, and 1930, c. 36). The Railway Act is a statute of general application. Sect. 5 enacts that, subject as therein provided, it shall " apply to all persons, railway companies and railways within the legislative authority of the Parliament of Canada. . . . ." As regard its relation to " Special Acts," it is enacted by s. 3 as follows :—

" 3. Except as in this Act otherwise provided, (*a*) this Act shall be construed as incorporate with the Special Act; and (*b*) where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act." A " Special Act " is defined by s. 2, sub-s. 28, as " any Act under which the company has authority to construct or operate a railway or which is enacted with special reference to such railway."

Sect. 256, under which it is maintained by the respondents that the Railway Board had jurisdiction to pronounce the order in question, is in the following terms :—

" 256. Upon any application for leave to construct a railway upon, along or across any highway, or to construct a highway along or across any railway, the applicant shall submit to the Board a plan and profile showing the portion of the railway and highway affected.

2. The Board may, by order, grant such application in whole or in part and upon such terms and conditions as to protection, safety and convenience of the public as the Board

deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, or that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of the granting of the application in whole or in part in connection with the crossing applied for, or arising or likely to arise in respect thereof in connection with any existing crossing."

The immediately preceding section, as amended in 1930, provides as follows : " 255. The railway of the company may, if leave therefor is first obtained from the Board as hereinafter authorised, but shall not without such leave, be carried upon, along or across any existing highway. . . . ." If the Railway Board had jurisdiction under s. 256 to authorize the crossing of St. Antoine Street by the proposed railway viaduct and the construction of the requisite subway, this had the effect of bringing into operation s. 39 of the Act, which reads as follows : " 39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained. 2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid."

It is in the exercise of the power which they claim to possess under this section that the Railway Board have directed the appellants to move their plant in the street, and the main grievance of which the appellants complain is that they are in consequence left entirely in the hands of the Railway Board as regards the cost of carrying out the work of removal and replacement of their plant.

In disputing the jurisdiction of the Railway Board to pronounce the order in question the appellants in the first place contended that s. 256 of the Railway Act, under which the order purports to be made, was entirely displaced by the provisions of the Terminals Act. That Act, they said, itself authorizes the construction of the railway viaduct across St. Antoine Street, and what Parliament has itself authorized cannot be the subject of authorization by the Railway Board. Sect. 256 of the Railway Act confers a discretion on the Railway Board to grant or to refuse an application for authority to carry a railway across a highway, and therefore, the appellants argued, it can have no application to a case where Parliament has already granted the requisite authority, either directly, or indirectly through the Governor in Council, and where there is consequently no discretion left for the Railway Board to exercise. The argument in short is that s. 256 of the Railway Act is ousted by the Terminals Act, and so cannot be invoked either by the Railway Board or by the respondents to justify the order in question.

This argument, in their Lordships' opinion, is founded on a misconception of the purpose, province and effect of the Terminals Act. That Act does not profess to do more than authorize the Governor in Council to "provide for" the construction by the railway company of a list of various kinds of works of the most miscellaneous description, shown "generally" on a plan or plans to be approved by the Governor in Council, and of which "a short description" is set out in the schedule "for the information of Parliament but not intended to be exhaustive." No provision is made for detailed plans, books of reference, or any of the usual machinery essential for carrying out a statutory enterprise which involves interference with public and private rights. No doubt it appears from the general plan and the schedule that the viaduct forming item (*b*) of the schedule is to be carried across St. Antoine Street between certain named streets running north and south, but that is all. No details are given as to the height of the viaduct over the street, its relation to the existing roadway and buildings, or any of the other engineering features of the work. The schedule, it may be noted, concludes with the words: "Nothing in this schedule is to be taken to restrict the general powers of the Company as expressed in the foregoing Act or other Acts relating to the Company." The fact of the matter is that the purpose of the Terminals Act was to give Parliamentary sanction to the scheme as a whole and to provide means for raising the necessary capital. Sect. 3 is the real pivot of the Act; it empowers the Governor in Council to authorize the guarantee of the principal and interest of securities to be issued by the railway company, to an amount not exceeding $50,000,000, in respect of the construction and completion of the works. The granting of this guarantee necessitated that Parliament and the Governor in Council should be informed and approve generally of the nature of the scheme to which the public credit was to be pledged. These essentials being secured by the Act, everything else is left to be worked out by the already existing statutory machinery available for the purpose.

This is in consonance with what their Lordships were informed is the usual private legislation procedure in Canada in connection with railway bills, whereby Parliament merely sanctions the general scheme and authorizes the raising of the requisite capital, delegating to the Railway Board the determination of all the practical details of the construction of the line. The promoters of the Terminals Act had obviously in view s. 21 of the Canadian National Railways

Act (R. S. Can., 1927, c. 172, amended by statutes of Canada 1928, c. 13, 1929, c. 10, and 1930, c. 6). That section enacts as follows: "21. With the approval of the Governor in Council and upon any location sanctioned by the Minister of Railways and Canals, the Company may from time to time construct and operate railway lines, branches, and extensions or railway facilities or properties of any description in respect to the construction whereof respectively Parliament may hereafter authorise the necessary expenditure or the guarantee of an issue of the Company's securities."

The Terminals Act seems precisely to satisfy the requirements of that section, but no more absolves the railway company from compliance with the general railway law than does that section itself. As Rinfret J. points out in his judgment, "In no respect is the Act self-contained," and it could never be carried into execution without recourse to other existing legislation. It would indeed have been surprising if Parliament by the Terminals Act had displaced all the powers which the Railway Board possesses for securing the protection of the public in the matter of railway crossings, without itself providing any substituted safeguards. Mr. Geoffrion for the appellants suggested, if their Lordships understood him aright, that although s. 256 of the Railway Act was ousted, ss. 263 and 264 might still apply and afford sufficient protection to the public. These sections provide that at overhead railway crossings the highway must not be narrowed to less than 20 feet or have a clearance of less than 14 feet, and that safe and adequate facilities for traffic must be afforded. But s. 263 opens with the words "unless otherwise directed or permitted by the Board," which link it with the other relative provisions of the Act, including s. 256, and it would be a curious result if the Terminals Act were to have displaced some while preserving others of the sections in the fasciculus headed "Highway crossings, etc." which embraces s. 255 to s. 267 inclusive.

There is, however, in the Terminals Act itself a clear indication that Parliament contemplated that the provisions of the Railway Act regarding the crossing of highways would apply to the works in question, for in s. 8 it deals specially with the case "where streets or highways are affected by the said works but are not crossed by the company's tracks . . . . and by reason thereof the Board of Railway Commissioners for Canada has no jurisdiction under the Railway Act with respect thereto"; here the plain implication is that where streets or highways *are* crossed by the company's tracks the Railway Board will have jurisdiction.

Reference was made to s. 162 of the Railway Act, which confers general powers on railway companies, including power to "(*n*) divert or alter the position of any water pipe, gas pipe, sewer or drain, or any telegraph, telephone or electric lines, wires or poles," to s. 163, which requires the company to restore any plant so diverted or altered, and to s. 164, which provides for the payment of compensation for any damage done by the company in the exercise of its powers. The appellants in their effort to extricate themselves from s. 39 of the Railway Act, under which the work of removing and relaying their plant has been directed to be done by them, point to the fact that the Railway Board may, under s. 39, order third parties to execute work, "except as otherwise expressly provided," and suggest that under s. 162 there is express provision that the railway company is itself to carry out the work of removing and relaying public utility plant, and that consequently the appellants cannot be ordered to do so. But s. 162 is expressed to be "subject to the provisions in this and the special Act contained," and it is plain that the extensive permissive powers of that section do not oust the controlling powers of the Railway Board. Another suggestion was that s. 2 of the Terminals Act requires that all the works should be carried out by the Canadian National Railway Co. itself, and that by this it is "otherwise expressly provided" within the meaning of s. 39 of the Railway Act so as to preclude the Railway Board from ordering any other parties to execute any part of the works. It is enough to say that in their Lordships' opinion s. 2 of the Terminals Act imports no such restriction.

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It is worth noting in disposing of this first branch of the appellants' argument that the order of the Railway Board does not authorize in general terms the crossing of St. Antoine Street by the proposed new viaduct, as to which it might be said that Parliament had already given the necessary authority. What it does do is to authorize the construction of a subway on St. Antoine Street "*as shown on the general plan and profile on file with the Board*," neither of which had received or required to receive the approval of Parliament or of the Governor in Council. For the construction of the subway in the particular manner shown on this plan and profile the Railway Board's authorization was appropriate and requisite, and involved no usurpation or infringement of what Parliament had itself chosen to enact in the Terminals Act.

But if the arguments of the appellants hitherto discussed are, as their Lordships hold, ineffectual to invalidate the order of the Railway Board, the appellants have another string to their bow. They next contend that ss. 256 and 39 of the Railway Act have no application at all to the Canadian National Railway Co. by reason of the terms of the Canadian National Railways Act, which is the general charter of the company. They refer to s. 17 of that Act, which, as amended, reads as follows: "17.—(1.) All the provisions of the Railway Act shall apply to the Company, except as follows: (*a*) such provisions as are inconsistent with the provisions of this Act; (*b*) the provisions relating to the location of lines of railway and the making and filing of plans and profiles, other than highway and railway crossing plans; (*c*) such provisions as are inconsistent with the provisions of the Expropriation Act as made applicable to the Company by this Act.

(2.) (*a*) All the provisions of the Expropriation Act, except where inconsistent with the provisions of this Act, shall apply mutatis mutandis to the Company; . . . ."

The argument is that on a sound construction of this section the provisions of the Expropriation Act which are thereby substituted for those of the Railway Act furnish

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the relevant legislation applicable to the matter in hand, and in particular exclude the applicability of ss. 256 and 39 of the Railway Act.

Commenting on the original edition of this section, the Board in *Boland* v. *Canadian National Railway Co.* (1) observed that it employed " a very involved method of expression." It cannot be said that in its amended form the section presents a more happily inspired example of legislation. Sub-s. 1 starts by applying to the Canadian National Railway Co. all the provisions of the Railway Act with certain exceptions. The only provisions expressly excepted are those mentioned in (*b*) ; the other provisions to be excepted are those which are found on examination to be inconsistent with (*a*) the Act under construction, or (*c*) the provisions of the Expropriation Act as made applicable to the company by the Act under construction. Now under head (*b*) the express exception of the provisions of the Railway Act relating to the making and filing of plans and profiles is qualified by the addition of the words " other than highway and railway crossing plans." This is an exception upon an exception, and is tantamount to an express enactment that the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans are to apply to the Canadian National Railway Co. The provisions of the Railway Act so made applicable to the Canadian National Railway Co. cannot be displaced by any provisions of the Expropriation Act, for sub-s. 2, in applying all the provisions of the Expropriation Act to the company, expressly excepts such of its provisions as are " inconsistent with the provisions of this Act," and one of " the provisions of this Act " is that the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans are to apply to the company. It would therefore be inconsistent with " the provisions of this Act " to apply to the company any provisions of the Expropriation Act relating to the making and filing of highway and railway crossing plans, for to these matters " this Act " has expressly applied the provisions of the Railway Act. And these provisions of the Railway Act cannot be excluded by sub-s. 1 (*c*), for they cannot be inconsistent with the provisions of the Expropriation Act "as made applicable to the company by this Act," inasmuch as the Expropriation Act is made applicable to the company under the exception of the Railway Act provisions in question.

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(1) [1927] A. C. 198, 205.

This distasteful exercise in dialectics confirms the impression which a less sophisticated reading of the section conveys that the Act, while intending to arm the Canadian National Railway Co. generally with the very drastic powers which the Expropriation Act confers on the Minister of Public Works, was careful to secure that the company should remain subject to the Railway Act in the matter of the making and filing of highway and railway crossing plans.

But it is necessary to consider what is the scope of this reservation. The Board in the passage in *Boland's* case already referred to raises but does not decide the question whether the words include "the authorization of the construction of the crossing indicated by the plans" or mean merely "a piece of paper with a drawing on it." Their Lordships are of opinion that the reservation, though no doubt inartistically expressed, was intended to have and has the effect of subjecting the Canadian National Railway Co. to the provisions of the Railway Act contained in the two groups of sections headed "Crossings and junctions with other railways" and "Highway crossings, etc.," extending respectively from s. 252 to s. 254 and from s. 255 to s. 260, and excludes the company from possessing the more autocratic powers which the Expropriation Act by s. 3 gives to the Minister in the matter of works affecting railway and highway crossings. The statute not unnaturally fixes upon the step of making and filing plans as the distinctive step in relation to any work under the Railway Act, for a perusal of the statute shows that it is through its power of ordering and approving or disapproving plans that the Railway Board in general makes its jurisdiction effective. Faced again with the implication from s. 8 of the Terminal Act that Parliament regarded the Canadian National Railway Co. as subject to the jurisdiction of the Railway Board in the matter of highway crossings, the appellants were constrained to argue that if Parliament so understood then Parliament was labouring under an error in law. Their Lordships do not find this imputation justified.

Their Lordships accordingly hold that s. 17 (as amended) of the Canadian National Railways Act has not the effect of rendering s. 256 (and consequently s. 39) of the Railway Act inapplicable to the respondent company.

A third point taken by the appellants may be briefly dismissed. The argument which they submitted was that their plant in or on the streets being of the nature of "land" within the statutory meaning, the respondents must resort to the statutory provisions applicable to the compulsory acquisition of land. The short answer is that the respondents do not intend and are not empowered to acquire any part of the roadway of St. Antoine Street. When the street works are completed the respondents will not own a yard of the highway. When the Railway Board, in authorizing a railway company to carry its track overhead across a highway, orders the company to lower the level of the highway, the railway company is not required to purchase the stratum of roadway which has to be excavated and removed. The lowering of the level of the highway is a work which the Railway Board can order the railway company (or a third party) to execute in alieno solo, and the question of who shall bear the cost of the work is left to the Railway Board to determine. The railway company acquires nothing.

The appellants also referred to s. 260 of the Railway Act, which requires a railway company at its own cost and expense, except where otherwise agreed, to provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway. This section, however, relates only to cost and does not affect the present question of jurisdiction.

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Their Lordships have now dealt with all the grounds on which the appellants in their argument at the bar have challenged the jurisdiction of the Railway Board to pronounce the order relating to the St. Antoine Street subway. In their Lordships' opinion, the attack on the order fails at all points and the judgment of the Supreme Court dismissing Appeals Nos. 2, 4 and 6 ought to be affirmed.

Their Lordships now turn to the case of the

D'ARGENSON STREET SUBWAY, MONTREAL.

D'Argenson Street is a highway extending in a northerly and southerly direction through the south-westerly section of the city of Montreal. It is crossed overhead by the existing tracks of the respondents, the highway passing under the railway by a subway. The scheme for the improvement of the respondents' traffic facilities in Montreal, which was sanctioned by the Terminals Act, included a reconstruction and lengthening of this subway so as to enable additional tracks to be carried over the highway. D'Argenson Street is not mentioned by name in the Terminals Act, but the work of extending the d'Argenson Street subway is admittedly included in the schedule to the Act under item: "(*e*) Grade separation by means of elevated or depressed or underground tracks or streets as may be determined, between St. Henri and Point St. Charles." The present subway was in existence when the appellants laid in the solum of the highway the ducts, mains and cables which form part of the plant of their public utility undertakings. The proposed extension of the subway will necessitate the lowering of the level of additional portions of the highway and consequently the displacement and relaying of the appellants' plant throughout these portions. It will be observed that the only material distinction between this case and that of the St. Antoine Street subway is that in this instance the highway is already crossed overhead by railway tracks, whereas in St. Antoine Street there was no existing railway crossing.

The procedure before the Railway Board in the case of this subway followed the same lines as in the case of the

St. Antoine Street subway, and on September 16, 1930, the Railway Board made the Order No. 45,410, whose validity the appellants challenge. The order is in the same form as the St. Antoine Street order mutatis mutandis. It authorizes the railway company " to construct a subway at d'Argenson Street in the City of Montreal on the line of the said railway between Point St. Charles and St. Henri as shown on the said general plan on file with the Board," and it directs the appellants and others " to move such of their utilities as may be affected by the construction of the said subway," all questions of costs being reserved for further consideration by the Board. The order professes to be made under s. 256 of the Railway Act, as in the St. Antoine Street case. This is presumably right, as the application was for authority to carry additional tracks over the highway and the extensions of the subway north and south are treated as new subway works. Sect. 257, which their Lordships will set out when they come to deal with the Toronto case, no doubt deals with the case of a railway already constructed across a highway, but is apparently concerned with alterations of grade and other protective measures with regard to the tracks as they are, and does not or may not relate to such a case as the present, where additional tracks are proposed to be carried over the highway and additional subway works are necessitated. To this latter case s. 256 appears appropriate ; it is not in terms limited to the case where there is no existing railway track across the highway.

The appellants challenged the jurisdiction of the Railway Board to pronounce the present order upon the same grounds and with the same arguments as their Lordships have already held to be unavailing in the case of the St. Antoine Street order. It is obviously even more difficult in this case to argue that Parliament has by the Terminals Act specifically authorized this particular work, so as to oust the jurisdiction of the Railway Board, when regard is had to the very vague and general terms of item (*e*) in the schedule, quoted above. It suffices accordingly for their Lordships to find, for the reasons assigned in the St. Antoine Street case, that the judgments of the Supreme Court in Appeals Nos. 1, 3 and 5 were also well-founded and should be affirmed.

The seventh appeal relates to the

ST. CLAIR AVENUE SUBWAY, TORONTO.

St. Clair Avenue is a highway running east and west through the north-westerly section of the City of Toronto. It is crossed on the level by the track of the respondents, the Canadian National Railway Co. In the solum of the highway the Bell Telephone Co., who are the only appellants in this case, some twenty years ago constructed an underground conduit in which are laid their telephone lines and cables.

According to the statement of facts the city of Toronto in 1922 made application to the Railway Board for an order that the Canadian Pacific Railway Co. and the present respondents be required to collaborate with the city in the preparation of a joint plan for the separation of grades in the north-west portion of the city. After sundry procedure the Railway Board on May 9, 1924, made an order under ss. 257 and 259 of the Railway Act directing (inter alia) that a subway be constructed at St. Clair Avenue. No steps were taken to construct this subway until in 1930 the respondents intimated to the Railway Board that arrangements for the construction of a subway at St. Clair Avenue had been completed, and submitted a plan which they asked the Railway Board to approve. The plan showed a diversion of the respondents' line a short distance to the west and a subway in St. Clair Avenue over which it was proposed to carry the respondents' track. The respondents in their application asked the Railway Board to authorize the construction of the subway and the diversion of their line, at the same time requesting the Railway Board to order the appellants and others to make the necessary changes in their facilities when requested to do so by the respondents' chief engineer. The work was stated to have been approved by Order in Council under s. 21 of the Canadian National Railways Act. On this application the Railway Board on January 8, 1931, made the order now challenged whereby, purporting to act under ss. 178 and 257 of the Railway Act, they authorized the respondents to construct a subway under their tracks where they cross St. Clair Avenue and to divert their main line to the west, as shown on the plan and profile on file with the Board, and further directed the appellants and others to move such of their facilities as might be affected by the construction of the subway, reserving the question of the cost for the further consideration of the Board.

The following are the material parts of ss. 178 and 257 of the Railways Act under which the order purports to have been made: "178. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, showing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board."

"257. Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected."

The appellants in impugning the jurisdiction of the Railway Board to pronounce this order cannot of course found any argument on the Terminals Act, which relates only to Montreal. But in submitting that s. 257 of the Railways Act was inapplicable to this subway they advanced all the other arguments which they used in the Montreal appeals and which their Lordships have already so fully discussed. It will be enough to say that in their Lordships' opinion these arguments are as ineffectual with regard to s. 257 as they have been shown to be with regard to s. 256 in the Montreal appeals.

Two special points, however, call for notice. The appellants draw attention to the fact that the order proceeds on s. 178 as well as on s. 257, and maintain that this is not a case of constructing a subway at a point where there is an existing railway crossing, but is a case of constructing a new diverted line and a new crossing. They further argue that at any rate s. 178 of the Railways Act is not saved by s. 17 of the Canadian National Railways Act, and that the Expropriation Act is accordingly applicable to the work. But the appellants overlook the fact that s. 257 expressly authorizes the Railway Board to order, where there is an existing crossing, that the railway be permanently diverted, and if the plan for the alteration of an existing crossing includes an incidental diversion of the railway this may fairly be held to be within the reservation in s. 17 of the Canadian National Railways Act, which saves the provisions of the Railway Act relating to the making and filing of highway and railway crossing plans, even if s. 178 is not otherwise applicable to the respondents, as to which their Lordships express no opinion.

The other point taken by the appellants was that s. 257, even assuming it to be applicable generally to the respondents, is inapplicable to this particular case, inasmuch as the

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respondents are here themselves the applicants, whereas the section contemplates action either by the Railway Board or by some third party in invitum of the railway company. There is nothing in this point. If the Railway Board may act in the matter of its own motion there is nothing incompetent in its being set in motion by an application by the railway company. Moreover, the history of this case shows that the initiative was originally taken with regard to St. Clair Avenue by the city of Toronto, and the railway company in submitting the application upon which the present order was made was only seeking to effectuate the Railway Board's previous order that the level crossing in this street should be eliminated by the construction of a subway.

The result is that in their Lordships' opinion this appeal also should be dismissed.

The eighth of the consolidated appeals has next to be considered. This relates to

SUBWAYS, ETC., IN HAMILTON, ONTARIO.

Here the Bell Telephone Co. are again the sole appellants, but in this case the respondents are the Toronto, Hamilton and Buffalo Railway Co. and the Corporation of the City of Hamilton. Thus the complicated problems which their Lordships have had to solve in the Montreal and Toronto appeals, in consequence of the special legislation applicable to the Canadian National Railways, fortunately, do not present themselves again. There is no question as to the application of the Railway Act to the respondent railway company. The questions which arise relate to the scope of the Railway Board's powers under that Act with regard to certain of the works which it has sanctioned by its order.

The joint application of the respondents to the Railway Board is dated October 30, 1930, and requested approval of a plan showing an extensive series of alterations in the system of the respondent railway company in the city of Hamilton, and authorization of the various works shown on the plan. These works included the deviation of a considerable length of the railway, the construction of a new elevated track crossing a number of streets by means of overhead bridges, the formation of subways in these streets, the closing and the diversion of certain streets and the erection of a new station.

On November 14, 1930, the Railway Board, purporting to act under ss. 162, 178, 188, 199, 201, 252, 255, 256 and 262 of the Railway Act, made an order No. 45,813 authorizing the railway company to carry out the proposed works. The first four paragraphs of the order relate to the proposed deviation, the overhead bridges, the subways and the compulsory acquisition of land. In the fifth paragraph it is ordered: "5. That the city close the streets known as Hunter, Charles, Hughson, Walnut, Baillie, Augusta and Wellington within the limits indicated on the said plan and divert Hunter, Aurora and Liberty Streets as shown on the said plan." The sixth paragraph relates to the relocation of one of the railway company's lines, the seventh to the construction of the new station, and the eighth to the reconstruction of a street railway or tramway in one of the subways. By the ninth paragraph the appellants and other public utility companies are ordered to reconstruct, alter or change the respective works of each in order to carry out the changes in the railway shown on the said plan and profile. The order concludes by reserving for the further consideration of the Railway Board the apportionment of the cost of the works.

The appellants have ducts, conduits, poles, wires, cables and other plant in or on a number of the streets whose level requires to be altered for the purpose of the new subways, and also in or on the portions of the streets to be closed. In so far as the appellants challenged the jurisdiction of the Railway Board to order them to reconstruct, alter or change their plant in the streets to be carried under the new elevated tracks by means of subways, the appellants' contentions were the same as those which they advanced in the Toronto case, except that the arguments arising from the special statutory position of the Canadian National Railways were not open to them. These contentions, for the reasons already assigned, can have no better success in the present instance, and their Lordships accordingly hold that so far as the subways are concerned the order impugned was within the competence of the Railway Board.

The appellants, however, raised a special point with regard to para. 5 of the order, quoted above, and argued that the Railway Board had no power to order the city of Hamilton to close portions of the streets mentioned or any streets. They submitted that the only jurisdiction which the Railway Board has over highways is conferred by ss. 256 and 257 of the Railway Act, set out above, and that these sections do not authorize the making of an order on the city to close highways.

The objection of the appellants is a highly technical one, for the city of Hamilton, which has power under municipal legislation to close streets, has agreed with the respondent railway company that the portions of the streets in question should be closed, and has joined with the railway company in requesting the Railway Board to order that they be closed. The object of the appellants presumably in insisting on their objection to the matter being made the subject of an order by the Railway Board is that it is only when the Railway Board has power to make an order that it is authorized by s. 39 of the Railway Act to direct work to be done by third parties. Consequently, if the Railway Board had no power to order the closing of the streets, it could not order the appellants to execute any work necessitated by the closing of the streets.

In dealing with this rather intricate question, it is important to have in mind the nature of the extensive scheme of railway reconstruction which is shown on the plan prepared by the railway company, agreed to by the city, and sanctioned by the Railway Board. In its main features it is a comprehensive scheme of what is called grade separation for the elimination of level crossings in the streets of Hamilton. In the preamble of the agreement between the city and the railway company it is recited that the city " has requested the railway company to proceed with grade separation in the city of Hamilton which will necessitate a change in the route and grades of the railway," and the removal and replacement of certain of the railway company's tracks and other works. The preamble proceeds to recite that "the changes and alterations from the present location of the railway of the railway company between the said points involves a deviation slightly to the south of its present route and the elevation of its tracks, construction of underpasses at certain streets, and the closing and diversion of other streets, the construction of a new station and other building and facilities . . . ."; that "the changes in the said location of the railway necessitate the consideration and settlement of grade separation problems in the said city"; and that "the works hereinafter set forth comprised in and connected with grade separation are of mutual benefit to the city and the railway company." By article 6 of the agreement the city agrees to close certain streets and to divert certain streets all as shown on the plan, and to convey to the railway company the portions of the streets to be closed. From all this it plainly appears that the project is one for dealing with existing highway crossings in the city in the interest of the protection, safety and convenience of the public. That is just the kind of problem with which the Railway Board is by s. 257 empowered to deal. The railway at present crosses on the level a whole series of transverse streets in Hamilton, including Charles, Hunter and Baillie Streets, in which the appellants are interested because of the presence of their plant in the solum of those streets. The Railway Board in dealing with an existing crossing may among other things order that the highway be permanently diverted (which presumably includes the closing of the portion of the highway diverted), and that "such other work be executed . . . . or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such" crossing.

In the present case the proposal is to deal with the existing series of level crossings by reconstructing the railway on a

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higher level and by constructing subways in certain of the cross streets and closing others. There can be no question of the competence of the Railway Board to authorize the construction of what is in effect a new stretch of railway track on a higher level. Physically this would have the effect of blocking the transverse streets and necessitating either the construction of subways or the closing of the portions of the streets where the existing level crossings are situated. It may be noted in passing that among the general powers conferred by s. 162 on railway companies is the power under head (*k*) to make or construct (inter alia) permanent embankments and fences across any highway which the railway intersects. It would seem to be open to the Railway Board, when dealing as here with a whole series of level crossings, to decide that the measure best adapted to remove the danger due to these crossings was to order that the railway be reconstructed at a higher level and that at some of the existing level crossings subways be provided, while at others the crossings be abolished and the portions of streets at present crossed on the level be closed. The closing of that portion of a street which is occupied by an existing level crossing is in their Lordships' view a method or measure for dealing with the danger which it is within the competence of the Railway Board to order. The Railway Board is no doubt mainly concerned with railway works. It may be that technically it is not empowered to order a municipality to perform the administrative act of officially declaring a portion of a street to be closed. But it may apparently sanction the construction of railway works which will have the effect of physically blocking a street, and it may also apparently authorize the acquisition by a railway of a portion of the highway for the purpose of its works and thereby put that portion of the highway out of use. The closing of a portion of a highway may thus be an incident of works which the railway may execute and the Railway Board may sanction, and their Lordships are of opinion that it is not incompetent for the Railway Board to order or permit the closing of the portion of a highway crossed by an existing level crossing, at any rate where, as here, this is incidental to a general scheme of rearrangement of level crossings in connection with an alteration of the railway and where, as here, the public authority having charge of the highways not only consents but is a party to the application to the Railway Board. If that be so, and the Railway Board can in such circumstances order or sanction the closing of a portion of the highway there would appear to be no incompetency in directing the city, as the appropriate party, to effect the closing. The justification for the order impugned is that it is a measure incidental to a scheme for dealing with the series of existing level crossings in the streets of the city.

The appellants finally suggested that the real purpose of closing Hughson Street was to enable the new station to be built upon part of it. The railway company has power under s. 162, sub-s. 8, of the Railway Act to construct stations, and the Railway Board under s. 188 must approve of the location of any proposed station. If the approved location is situated in part on a highway and the construction of the station involves the blocking of the highway, it would appear that the Railway Board may incidentally approve of and permit the necessary closing of the part of the highway affected. Their Lordships, however, agree with the Supreme Court that the materials for dealing with this point have not been made available, and for the present purpose it is sufficient to say that the appellants have not established any case on this ground for attacking the order of the Railway Board.

Their Lordships are accordingly of opinion that the judgment of the Supreme Court in this case should be affirmed and the appeal dismissed.

The separate appeal by the city of Montreal against orders Nos. 45,427 and 45,410 relating to the subways in St. Antoine Street and d'Argenson Street need not detain their Lordships long. The appellants own sewers, water conduits and electric wire conduits in these streets, and this plant will have to be removed and relaid in the course of the construction of the subways. The city did not appeal to the Supreme Court

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against the orders of the Railway Board, but, as already stated, were granted special leave to appeal here by order of His Majesty in Council. In their printed case they adopt in every respect the joint cases of the appellants in the other appeals against these orders, which their Lordships have already considered. Having made common cause with these other appellants, they must suffer the same fate. In any case this appeal would seem unmaintainable in view of the letters produced, in which the appellants inform the Railway Board that they have no objection to the orders against which they are now appealing. But it is unnecessary to pursue the matter further.

Their Lordships will humbly advise His Majesty that the eight consolidated appeals be dismissed and the judgments of the Supreme Court affirmed, and that the separate appeal of the city of Montreal be also dismissed. The respondents will have their costs of the appeals.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[HOUSE OF LORDS.]

H. L. (E.)* F. R. ABSALOM, LIMITED . . . . . APPELLANTS;

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AND

March 3. GREAT WESTERN (LONDON) GARDEN VILLAGE SOCIETY, LIMITED . . } RESPONDENTS.

Arbitration—Building Contract—Architect's Certificate—Award of Arbitrator—Misconstruction of Contract—Error appearing on Face of Award—Submission of Specific Question.

A building contract contained a clause, numbered 30, in these words: "The contractor shall be entitled . . . . under certificates to be issued by the architect to the contractor . . . . to payment by the employer from time to time by instalments, when in the opinion of the architect actual work to the value of 1000*l.* has been executed in accordance with the contract, at the rate of 90 per cent. of the value of the work so executed in the building and materials actually on the site for use on the works until the balance in hand amounts to the sum of 2000*l.*" . . . .

By clause 32, if any dispute should arise between the employer, or the architect on his behalf, and the contractors as to the construction of the contract or as to the withholding by the architect of any certificate to which the contractors might claim to be entitled, the dispute was to be referred to an arbitrator.

By another clause, No. 26, if the contractors should suspend the work, except in case of a certificate being withheld, the architect was empowered to give notice to the contractors to proceed with the work with all reasonable dispatch. Disregard of this notice might involve the contractors in serious consequences.

During the progress of the work, after 9000*l.* or more had been paid by the employers to the contractors upon certificates given by the architect, the contractors claimed that on March 11, 1929, they were entitled to a further substantial sum which had not been included in the architect's certificates. The employers insisted that the contractors had been overpaid, and that no certificate was due to them. The contractors thereupon stopped work, and the architect served upon them a notice under clause 26.

The parties then submitted to an arbitrator the "disputes in regard to (1.) the issue of certificates and (2.) the validity of the notice served by the architect under clause 26" of the contract. The arbitrator found that on May 11, 1929, there remained due to the contractors a sum of 793*l.* 17*s.* 10*d.*, and awarded that "having regard to the provisions of clause 30" (which he then set out as above) "the architect had up to the said 11th day of March, 1929, issued to the contractor certificates in accordance with the terms of the contract." He further awarded that the notice given under clause 26 was properly given and was valid:—

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

Held, that the arbitrator had erred in his construction of clause 30 of the contract in holding that, after the value of work done and materials on the site had reached the sum of 1000*l.*, it was still necessary that a round sum of 1000*l.* should be due to the contractors in order to entitle them to a certificate; that the construction of s. 30 had not been expressly or specifically left to the arbitrator, and that his award should be set aside for error in law appearing upon the face of it.

Hodgkinson v. *Fernie* (1857) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66 distinguished; *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Company of London* [1912] A. C. 673 followed.

Order of the Court of Appeal discharged and case remitted to the arbitrator.

APPEAL from an order of the Court of Appeal reversing an order of the King's Bench Division remitting an award to an arbitrator to whom a dispute had been referred.

The facts are set out in the opinion of Lord Russell of Killowen.

The contractors moved in the King's Bench Division to set aside the award of the arbitrator mentioned in the headnote, on the ground of error in law appearing on the face of the award, the error being the misconstruction of clause 30 of the contract. The motion was heard by Swift and Macnaghten JJ., who made an order remitting the award to the arbitrator.

The employers appealed from this order to the Court of Appeal, and that Court (Scrutton and Greer L.JJ.) upheld the award of the arbitrator and allowed the appeal, on the ground that the construction of s. 30 of the contract had been left to the arbitrator, that consequently his construction, whether right or wrong, bound the parties, and that his misconstruction, if any, would not amount to error appearing on the award.

The contractors appealed from that order.

1933. Feb. 16. *E. W. Cave K.C.* and *Graham Mould* for the appellants. The question is whether this case falls within the general rule in *Hodgkinson* v. *Fernie* (1) or within the exception recognized in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London.* (1) In order to answer that question it is necessary to ascertain what question or questions the parties submitted to the arbitrator. The facts which led to his appointment were that the contractors claimed that on March 11, 1929, they were entitled to have from the employers' architect a certificate for 1691*l*. 1*s*. 11*d*. They arrived at this figure by stating that the value of the work executed by them and the value of materials on the site on that date was 12,361*l*. 4*s*. 4*d*.; that after deducting 10 per cent. for retention money there remained a balance of 11,125*l*. 1*s*. 11*d*.; and that setting against this balance a sum of 9434*l*. which had already been paid by the employers there remained 1691*l*. 1*s*. 11*d*., the amount claimed.

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(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

The employers contended that the value of work done and materials on the site was no more than 10,367*l*. 18*s*. 3*d*.; that a deduction of 10 per cent. left 9331*l*. 2*s*. 5*d*., and that as the contractors had already been paid 9434*l*., nothing was due to them, but they had been overpaid by 102*l*. 17*s*. 7*d*. The employers and their architect therefore refused to reopen or revise the certificates already given or to grant any further certificate. Thereupon the builders on March 15, 1929, suspended work, and on March 16 the architect gave them notice under s. 26 requiring them to proceed with the work in a reasonable manner and with all reasonable dispatch.

In these circumstances the arbitrator was appointed under clause 32 of the contract with power to open up, revise and review any certificate and to determine all matters in dispute which should be submitted to him, and there were submitted to him the "disputes" which had arisen between the parties "in regard to (1.) the issue of certificates and (2.) the validity of the notice served by the architect under clause 26 of the said conditions."

The arbitrator awarded that the value of work executed and the materials on the site on March 11, 1929, amounted to 11,364*l*. 6*s*. 6*d*., and that the net value of work for certification after deduction of 10 per cent. amounted to 10,227*l*. 17*s*. 10*d*. He further awarded that the total amounts of certificates issued by the architect for payment up to March 11, amounted to 9434*l*.—leaving 793*l*. 17*s*. 10*d*. due to the contractors. Then he awarded in para. 3 of his award "that having regard to the provisions of clause 30 of the said conditions," meaning the building contract, "providing that the contractors should be entitled upon the valuation of the surveyor and under the certificates to be issued by the architect to the contractors . . . . to payment by the employers from time to time by instalments when in the opinion of the architect actual work to the value of 1000*l*. had been executed in accordance with the contract at the rate therein provided, the architect had up to the said 11th day of March, 1929, issued to the contractors certificates in accordance with the terms of the contract." He goes on to award that, having regard to the fact that the contractors suspended work under the contract on March 15, 1929, the notice dated March 16 given by the architect to the contractors under clause 26 of the contract was properly given and was valid.

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(1) [1912] A. C. 673.

Now clause 30 of the contract might well give rise to the question whether it means (1.) that the contractors are not at any time to have a certificate from the architect unless at the time when they apply for a certificate the value of the work done and materials upon the site, less 10 per cent. and less the amount already paid by the employers, amounts to 1000*l*.; or whether it means (2.) that the condition that there shall be 1000*l*. due only applies to the first certificate, and that when once the value of the work done and materials has reached 1000*l*. and the first certificate has been given, then from that time forward the contractors are entitled to certificates from time to time for the actual value of work done and materials on the site after deducting 10 per cent. and the amount of former payments, although the amount thus ascertained is less than 1000*l*. If the question, which of these constructions is the correct one, had been expressly and specifically submitted to the arbitrator, the case would have fallen within the principle of *Hodgkinson* v. *Fernie* (1), and the parties would have been bound by his decision, whether right or wrong. But if this question was not expressly submitted, but was only decided by the arbitrator as a step towards his conclusion on the question which was submitted to him, then if he has decided it wrongly and this decision appears in the award as the ground of his conclusion, the case comes within the *British Westinghouse Electric Co.'s* case (2), and the award is bad for error appearing upon the face of it: *Attorney-General for Manitoba* v. *Kelly* (3) and *Government of Kelantan* v. *Duff Development Co.* (4) are to the same effect, especially the judgment of Lord Trevethin in the last named case. (5)

The question which of the alternative constructions of clause 30 was the right one was not expressly or specifically submitted to the arbitrator. He was charged in general terms to hear and determine disputes which had arisen " in regard to the issue of certificates and the validity of the notice served by the architect " on March 16, 1929, " under clause 26 of the conditions." He has decided that there was due to the contractors a sum of 793*l*. 17*s*. 10*d*. He has gone on to say that accordingly the architect had issued certificates in accordance with the contract, and that the notice given by the architect on March 16, 1929, was properly given, and was a valid notice. As a step towards this conclusion he has adopted the first alternative construction of clause 30. This construction is wrong. The case falls within the *British Westinghouse Electric Co.'s* case (2); there is error appearing on the face of the award, and the award should be set aside.

W. T. Monckton K.C. and *J. W. Morris* for the respondents. The construction of s. 30 of the contract was submitted to the arbitrator. Too much weight is given in the argument for the appellants to the actual words in which a question is submitted. It is the fact and not the form of submission

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(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

(2) [1912] A. C. 673.

(3) [1922] 1 A. C. 268.

(4) [1923] A. C. 395.

(5) Ibid. 421.

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which gives jurisdiction to the arbitrator, and a question may be submitted by necessary implication as well as by express terms. What was submitted to arbitration in the present case was, first, a dispute or disputes, in regard to the issue of certificates. The issue of certificates is regulated by clause 30, and by no other clause. If they fulfil the conditions of that clause the appellants are entitled to a certificate; otherwise they are not. If the submission had been in the form: "Construe clause 30 and say whether the contractors are entitled to a certificate," the appellants would agree that the arbitrator's construction of that clause would have bound them; the question of construction would have been expressly left to him. Is it to be held that, when the parties say "We refer to you a dispute which has arisen between us in regard to the issue of certificates," a dispute which cannot be decided without construing clause 30, then the construction of clause 30 is not expressly submitted to the arbitrator and the parties are not bound by his award? Surely such a technicality could not be allowed any weight or influence.

The second matter referred was the validity of the notice served by the respondents' architect under clause 26. Under that clause the architect was empowered to serve a notice on the respondents if they should suspend work for any reason other than the reason that a certificate is being unlawfully withheld. Again the question cannot be answered without a decision upon the meaning of clause 30. The construction of that clause was therefore directly raised and by necessary implication submitted to the arbitrator, and his decision was final: *Hodgkinson* v. *Fernie* (1); *In re King and Duveen* (2); *Attorney-General for Manitoba* v. *Kelly* (3); *Government of Kelantan* v. *Duff Development Co.* (4), per Viscount Cave L.C.

E. W. Cave K.C. replied.

The House took time for consideration.

(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

(2) [1913] 2 K. B. 32.

(3) [1922] 1 A. C. 268.

(4) [1923] A. C. 395, 409.

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March 3. Lord Tomlin. My Lords, I am authorized by my noble and learned friend, Lord Buckmaster, to say that he has had an opportunity of reading and considering the opinion which has been prepared and will shortly be read by my noble and learned friend, Lord Russell of Killowen, and he concurs in it. I also have considered that opinion, and concur in it.

Lord Warrington of Clyffe. My Lords, this is an appeal from an order of the Court of Appeal (Scrutton and Greer L.JJ.) dated June 20, 1932, reversing an order of the King's Bench Division (Swift and Macnaghten JJ.) dated May 24, 1932, whereby it was ordered that the award of an arbitrator be remitted to him for reconsideration.

The question in the present appeal is whether the award is bad by reason of error in law appearing on the face of it. This involves the further question, whether the question of law decided by the arbitrator was specifically referred to him for his decision or was only one which necessarily arose in applying ascertained facts to the terms of the contract.

The material facts may be shortly stated: By a contract in writing dated November 14, 1928, and made between the respondents (therein and hereinafter referred to as "the employer") of the one part and the appellants (therein and hereinafter referred to as "the contractor") of the other part, the contractor agreed to erect for the employer certain houses at Hayes in the county of Middlesex. One T. Alwyn Lloyd was nominated as architect to the employer.

The contract contained the following material provisions: Clause 26: "If the contractor except . . . . in case of a certificate being withheld or not paid when due shall suspend the work . . . . the architect shall have power to give notice in writing to the contractor requiring that the work be proceeded with in a reasonable manner and with all reasonable despatch." . . . . Clause 30: "The contractor shall be entitled upon the valuation of the surveyor and under certificates to be issued by the architect to the contractor and within 14 days of the date of each certificate to payment by the employer from time to time by instalments when in the opinion of the architect actual work to the value of 1000*l.* has been executed in accordance with the contract at the rate of 90 per cent. of the value of the work so executed in the building and materials actually on the site for use on the works until the balance in hand amounts to the sum of 2000*l.*" The remainder of this clause is not material to the present question. Clause 32: "Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor . . . . as to the construction of the contract or . . . . as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed" as in the contract mentioned, "and the award shall be final and binding on the parties." It was expressly provided that the arbitrator should have power to open up, review or revise any certificates.

In the summer of 1929 disputes arose between the employer and the contractor, and a notice of such disputes was given by the contractor to the employer—no copy of this notice has been produced, but there is no question that it was duly given; and one Mr. Elgood was appointed as arbitrator. Mr. Elgood directed the parties to deliver to each other their respective claims for the purpose of formulating the dispute.

These were duly delivered—that of the contractor on October 11, 1929, and that of the employer on November 12, 1929. I refer to the pleadings, as I think I am entitled to do, solely for the purpose of ascertaining whether any specific question of law was in dispute and was referred to the arbitrator for his decision.

From the pleadings it is abundantly clear that the whole dispute between the parties was as to the amount due to the contractor in respect of the value of the work done and of the materials on the site up to and including March 11, 1929, the contractor claiming that the architect should have given certificates for 11,125*l.* 1*s.* 11*d.* gross instead of for 10,482*l.*, and the employer asserting that the certificates actually given were for an excessive amount and that the contractor had been overpaid.

It should be here mentioned that the balance of the 10,482*l.*, after deducting 1048*l.* for retention money—namely, 9434*l.*, was paid to the contractor. On March 15, 1929, the contractor suspended work on the ground that a certificate for the proper amount had been withheld or not paid, and on March 16 the employer retaliated by a notice under clause 26. The validity or invalidity of this notice depended entirely on the point raised by the several claims mentioned above. If the contractor was right on his figures a certificate had been withheld and the amount due had not been paid, and the employer had no right to give the notice under clause 26. In my opinion no specific question of construction arose, the validity or invalidity of the notice resulted from a decision as to the figures and the application of such decision to the provisions of the contract.

The arbitrator made his award dated December 19, 1931. After reciting the terms of clause 32 of the contract and stating that disputes arose in regard to (1.) the issue of certificates, and (2.) the validity of the notice under clause 26, he proceeds to award: (1.) that the value of the work executed and the materials on the site for use on the works up to and including March 11, 1929, amounted to 11,364*l.* 6*s.* 6*d.*, and that the net value for certification on that date, after deducting 1136*l.* 8*s.* 8*d.*, the 10 per cent. retention money, amounted to 10,227*l.* 17*s.* 10*d.*; (2.) that the total amounts of certificates by the architect for payments on accounts up to and including March 11, 1929, amounted to 9434*l.*

That is to say, he found that the amount of the certificates actually issued up to and including March 11, 1929, fell short of the proper amount by 793*l.* 17*s.* 10*d.*, and it was in my opinion his obvious duty to revise the defective certificate in accordance with his finding. He, however, did not do this, but by para. 3 he awarded that, having regard to the provisions of clause 30 as to the title of the contractor to be paid by instalments when in the opinion of the architect actual work to the value of 1000*l*. had been executed in accordance with the contract, the architect had up to March 11, 1929, issued to the contractor certificates in accordance with the terms of the contract. Further, as apparently the result of this last finding, he awarded (para. 4) that having regard to the fact that the contractor suspended work on March 15, 1929, the notice of March 16, 1929, under clause 26 was properly given and was valid. He then awarded that the contractor should pay the costs of the reference.

With all respect to the arbitrator and to the learned judges in the Court of Appeal, I am at a loss to understand how he arrived at his conclusion in para. 3. Even if the effect of the provision as to the 1000*l*. is that it applies every time a new certificate is applied for, it could not apply to the present case, in which there is no question of the issue of a new certificate for a fresh period, but merely of the revision of one already issued for a period then expired in order to make it conform to the figures already ascertained.

In my opinion, no such question as that answered by para. 3 was specifically submitted to the arbitrator for his decision. At most it was incidentally involved in the general question as to the validity of the notice purporting to have been given under clause 26. In such a case I am satisfied on the authorities that the award may be set aside if there be error on its face. The arbitrator has referred to the clause and thus in my opinion has incorporated it in the award, so that the error is patent on the face of it. I have already pointed out what is in my opinion the error he has fallen into.

On the whole, I am of opinion that an order in terms shortly to be proposed from the Woolsack will carry into effect the views I have above expressed.

The reasons above given would in my opinion justify the reversal of the order of the Court of Appeal, but out of respect to the learned judges in that Court I have referred to the case of *Hodgkinson* v. *Fernie*. (1) There the reference was as to the amount of damages for a collision at sea. The arbitrator awarded a lump sum. The defendants sought to show by affidavit that he had included an item which they alleged ought to have been rejected. Clearly, therefore, this was not a case of error on the face of the award.

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(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

I have also again read the opinions expressed in this House in *Government of Kelantan* v. *Duff Development Co.* (1), and I think it is clear that this case decides that, in order to come within the rule that a decision of an arbitrator on a point of law is final, it must be shown that the point is specifically referred. It recognizes the distinction between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally, as it is in the present case. I have not further discussed this and the other authorities. They are dealt with in the opinions of my noble and learned friends, Lord Russell of Killowen and Lord Wright, which I have had the privilege of reading and with which I agree.

Lord Russell of Killowen. My Lords, the appellants are contractors who entered into a contract dated November 14, 1928, with the respondents, by which they agreed to erect for the respondents twenty-four houses at Hayes, subject to the conditions set forth in the schedule to the contract. In the contract they are called respectively "the contractor" and "the employer," and I will refer to them accordingly.

The relevant conditions are Nos. 26, 30 and 32. Condition 26 provided (inter alia) that if the contractor should suspend the works the employer by the architect should have power to give a certain notice in writing to the contractor, from the giving of which certain consquences flowed. The clause, however, did not apply in case of a certificate being withheld.

The issuing of certificates was governed by condition 30, which ran thus: "Condition 30.—The contractor shall be entitled, upon the valuation of the surveyor and under the certificates to be issued by the architect to the contractor,

(1) [1923] A. C. 395.

and within 14 days of the date of each certificate, to payment by the employer from time to time by instalments, when in the opinion of the architect actual work to the value of one thousand pounds 1000*l*. has been executed in accordance with the contract, at the rate of 90%—ninety per cent.—of the value of the work so executed in the building and materials actually on the site for use on the works until the balance in hand amounts to the sum of two thousand pounds 2000*l*. after which time the instalments shall be up to the full value of the work subsequently executed. The contractor shall be entitled, under the certificate to be issued by the architect, to receive payment of one thousand pounds 1000*l*. being a part of the said sum of two thousand pounds 2000*l*. when the works are practically completed, and in like manner to payment of the balance within a further period of six months, or as soon after the expiration of such period of six months as the works shall have been finally completed, and all defects made good according to the true intent and meaning hereof, whichever shall last happen. The architect shall issue his certificates in accordance with this clause."

Condition 32 was an arbitration clause couched in the following terms: "Condition 32.—Provided always that in case any dispute or difference shall arise between the employer or the architect on his behalf and the contractor either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract or as to any matter or thing arising thereunder (except as to the matters left to the sole discretion of the architect under clauses 4, 9, 16, and 19, and the exercise by him under clause 18 of the right to have any work opened up), or as to the withholding by the architect of any certificate to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be appointed on the request of either party by the President for the time being of The Royal Institute of British Architects, and the award of such arbitrator shall be final and binding on the parties. Such reference (except on the question of certificate) shall not be opened until after the completion or alleged completion of the works, unless with the written consent of the employer or architect and the contractor. The arbitrator shall have power to open up, revise and review any certificate, opinion, decision, requisition, or notice, save in regard to the said matters expressly excepted above, and to determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition, or notice had been given. Upon every or any such reference the cost of and incidental to the reference and award respectively shall be in the discretion of the arbitrator, who may determine the amount thereof, or direct the same to be taxed as between solicitor and client or as between party and party, and shall direct by whom and to whom and in what manner the same shall be borne and paid. This submission shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889."

Up to and including March 11, 1929, the architect had issued certificates for payments on account amounting in the aggregate to the sum of 9434*l.* It would appear that the contractor claimed that the value of work executed and the materials on the site for use on the works comprised in the contract up to and including March 11, 1929, amounted to a substantially larger sum than the value upon which the sum of 9434*l.* was based, and that the certificate issued in relation to the above mentioned date should have been for a substantially larger sum accordingly.

The employer denied the right to any further or different certificate, whereupon the contractor stopped work. The employer then served a notice under condition 26, upon the footing no doubt that there had been no withholding of a certificate.

The quarrel between the parties having thus come to a head, they resorted to arbitration. In order to see what exactly it was that was referred to the decision of the arbitrator one ought to look at the notice which, by condition 32, one party was to give to the other. This document for some reason was not forthcoming, but it was agreed that the terms of the reference were to be ascertained from the recitals contained in the award. From this it would appear that the arbitrator was appointed to hear and determine disputes in regard to (1.) the issue of certificates and (2.) the validity of the notice served under condition 26.

The arbitrator made and published his award on December 19, 1931, the operative part of which is as follows :—

"1. I award and judge that the value of work executed and the materials on the site for use on the works comprised in the said contract up to and including the 11th day of March, 1929, amounted to 11,364*l*. 6*s*. 6*d*. and that the net value of work for certification on that date after deduction from the said sum of 11,364*l*. 6*s*. 6*d*. of the sum of 1136*l*. 8*s*. 8*d*. being the ten per cent. retention provided for by clause 30 of the said conditions amounted to 10,227*l*. 17*s*. 10*d*.

2. I award and judge that the total amounts of certificates issued by the architect for payments on account up to and including the said 11th day of March, 1929, amounted to 9434*l*.

3. I award and judge that having regard to the provisions of clause 30 of the said conditions providing that the contractors should be entitled upon the valuation of the surveyor and under the certificates to be issued by the architect to the contractors within the period in that clause mentioned to payment by the employers from time to time by instalments when in the opinion of the architect actual work to the value of 1000*l*. had been executed in accordance with the contract at the rate therein provided the architect had up to the said 11th day of March, 1929, issued to the contractors certificates in accordance with the terms of the contract.

4. I further award and judge that having regard to the fact that the contractors suspended work under the said contract on the 15th day of March, 1929, the notice dated the 16th day of March, 1929, and given by the architect to the contractors under clause 26 of the said conditions was properly given and was valid.

5. I further award and direct that the contractors do pay to the employers their costs of the said reference which failing agreement as to the amount thereof I direct to be taxed as between solicitor and client and that the contractors do pay the costs of this my award which I hereby determine at the sum of 68*l.* 5*s.*"

Upon a motion by the appellants to set aside this award, a Divisional Court of the King's Bench Division (Swift and Macnaghten JJ.) ordered that the award should be remitted to the arbitrator for his reconsideration. The foundation of this order was the view that the award was unintelligible, in that it appeared to state that a sum had not been certified and also to state that a sum had been certified.

To me this view seems unfair to the arbitrator and to his award. The document is both consistent and intelligible. By the first paragraph the arbitrator finds that the value of work executed and materials on the site up to and including March 11, 1929, was 11,364*l.* 6*s.* 6*d.*, and that the net value of work for certification on that date (i.e., after deduction of the 10 per cent.) was 10,227*l.* 17*s.* 10*d.* By the second paragraph he finds that the certificates in fact issued by the architect up to and including that date only covered payments to the contractors of 9434*l.*, i.e., a sum falling short of the net value of work capable of certification on that date by some 793*l.* By the third paragraph he decides that, upon what he considers to be the true construction and effect of condition 30, the certificates actually issued by the architect (covering the payment of only 9434*l.*) were all that the contractor was entitled to have issued up to March 11, 1929; in other words, that no certificate had been withheld. This decision as to the true construction of condition 30 leads not unnaturally to the award which is contained in the fourth paragraph. Since no certificate had been withheld, the suspension of work by the contractor was a suspension within condition 26, and a notice could be served under that condition. Notwithstanding the adverse criticism of the Divisional Court the award is to me intelligible and consistent. Whether there is error of law upon the face of it is another matter.

The order of the Divisional Court was set aside on appeal, with the result that the award stood; but by leave given to the contractor by the Court of Appeal, the matter now comes for consideration and decision to your Lordships' House.

Scrutton L.J. took the view (1.) that the questions which were referred to the arbitrator involved a decision as to whether upon the construction of the contract the contractor was entitled to certificates; (2.) that the arbitrator had construed a clause as meaning that where the contractor has withdrawn from the work there was no immediate right to a certificate for work then uncertified for; and (3.) that upon the authorities the arbitrator (unless a special case had been obtained) was the sole judge. The learned Lord Justice was in fact in error in his view as to the construction adopted by the arbitrator, but that is immaterial. The point of his judgment remains—namely, that the arbitrator having been selected to decide a question of construction his decision cannot upon the authorities be questioned. He also held that there was no error of law appearing on the face of the award. Greer L.J. thought that since the arbitration clause included questions of construction, the very point of construction which the arbitrator decided had been submitted to him for his decision; that his construction was thenceforth the conventional meaning of the contract as between the parties to it, and that it made no difference that the submission did not expressly submit the particular question.

My Lords, it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

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In the *Kelantan* case (1) Lord Cave made this distinction clear, and came to the conclusion, after considering the submission and the pleadings there in question, that specific questions of construction had been submitted to the arbitrator for his decision, with the result that his decision could not be interfered with merely on the ground of its being wrong. He adds, however, that if it was apparent on the face of the award that the arbitrator in arriving at his decision had proceeded illegally (e.g., on inadmissible evidence) that would be ground for interference. Lord Parmoor makes the same distinction, and so does Lord Trevethin when he says (2): "This is not . . . . a submission to arbitration of such a nature that though the law be bad upon the face of the award, the decision cannot be questioned. That happens only when the submission is of a specific question of law, and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Courts, and in lieu thereof to submit that question to the decision of a tribunal of their own."

The same distinction appears in the judgment of the Privy Council in the case of *Attorney-General for Manitoba* v. *Kelly* (3), in which the following passage occurs: "Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award."

In the case of *In re King and Duveen* (4) the question submitted to the arbitrator was whether upon a defined state of facts A. was liable under a certain agreement to pay damages to B. The arbitrator decided that he was not liable. B. moved to set aside the award on the ground that the award had found facts which showed that upon the true construction of the agreement B. was entitled to damages, and that accordingly there was error of law on the face of

(1) [1923] A. C. 395.
(2) Ibid. 421.
(3) [1922] 1 A. C. 268, 283.
(4) [1913] 2 K. B. 32.

the award. It was held that the award could not be set aside, because a specific question of law had been submitted to the arbitrator's decision.

On the other hand, in the *British Westinghouse Co.'s* case (1) no specific question of law had been submitted. The matters referred were a claim for the price of goods on the one hand and a counterclaim for damages on the other. Questions of law arose which had to be decided as being material in the decision on the respective claims. The arbitrator sought for and obtained from a Divisional Court answers to a special case as to how the questions of law should be decided. He then published his award, from which it appeared that it was based upon the answers of the Divisional Court. The Divisional Court and the Court of Appeal refused to set aside the award; but on appeal to this House it was set aside on the ground that the answers given by the Divisional Court were erroneous, and that therefore there was error of law appearing upon the face of the award.

The case of *Hodgkinson* v. *Fernie* (2) was an action for damages, the plaintiff's ship having been run down owing, as it was alleged, to the negligent navigation of the defendant's ship. At the trial a verdict was entered for the plaintiff for damages, the amount being referred to an arbitrator. The arbitrator made an award, simply fixing the damages at a sum of 713*l.* Upon an application to set the award aside it was attempted to show by affidavit that the 713*l.* included a sum of 496*l.* which had been allowed by the arbitrator owing to his having misconstrued a clause in a charterparty which had been entered into between the plaintiff and the Admiralty. It was held that no interference with the award was possible. This was simply a case in which no specific question of law had been referred, and in which no error of law appeared on the face of the award. Scrutton L.J. treats it as a case in which an error of law appeared on the face of the award. In this he is mistaken, as more clearly appears from the report of the same case in the Law Journal. (3)

(1) [1912] A. C. 673.
(2) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.
(3) 27 L. J. (C. P.) 66.

The crucial question upon this appeal appears to me to be this, to which class of cases does the present reference belong? Is it a reference in which a specific question of law was referred to the decision of the arbitrator as the sole tribunal, or is it a reference in which the questions of construction arise as being material in the decision of the matter which has been referred to arbitration? If the former the appeal must fail. If the latter it should succeed.

This is a question of some difficulty, as indeed it was in the *Kelantan* case. (1) In that case Lord Cave seems to have thought that a specific question of law had been submitted. Lord Trevethin thought not. Lord Parmoor thought it unnecessary to decide that point. In the present case I have on consideration come to the conclusion that no specific question of law was referred. The primary quarrel between the parties was whether, if the value of work executed and materials on site up to and including March 11, 1929, had been truly assessed, the net value available for certification on that date was in excess of (as the contractor alleged) or less than (as the employer contended) the amount which had actually been certified up to and including that date—namely, 9434*l*. Those were the disputes which were the foundation of the suspension of work on the one hand and the service of the notice on the other. Those were the disputes "in regard to the issue of certificates and the validity of the notice" which were in general terms submitted to the arbitrator. No specific question of construction or of law was submitted. The parties had, however, been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued so as to include therein the excess net value which they had alleged and which the arbitrator has found (though for a reduced amount) to have existed on March 11, 1929. It is at this point that the question of the construction of condition 30 arose as a question of law, not specifically submitted, but material in the decision of the matters which had been submitted. This question of law the arbitrator has decided; but if upon the face of the award he has decided it wrongly his decision is in my opinion open to review by the Court.

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(1) [1923] A. C. 395.

Is his decision erroneous? In my opinion it is. He has construed condition 30 as though the reference therein to actual work to the value of 1000*l.* in some way affected or qualified the contractor's right to receive payment of the full 90 per cent. of the value of the work executed and materials actually on the site on the relevant date—namely, March 11, 1929. In my opinion this is wrong. The words "when in the opinion of the architect actual work to the value of 1000*l.* has been executed in accordance with the contract" merely refer to and define the point of time before which no certificate can be given. After that point of time has arrived, if and when a certificate is given in regard to any particular date, the contractor is entitled to receive a certificate covering the true value of the work executed in accordance with the contract on the building and materials actually on the site for use on the works up to and including that date. In certificates subsequent to the first certificate, the value of work executed will only be the value of work executed since the date in reference to which the last preceding certificate was given.

The result is that the arbitrator has misconstrued condition 30 and has thereby erred in law. He should have revised the certificate which was given in relation to March 11, 1929, in such a way as to entitle the contractor to payment thereunder of an additional sum of 793*l.* 17*s.* 10*d.* From this it would follow that paras. 3, 4 and 5 could no longer stand.

There still remains the question whether this error of law is apparent on the face of the award. I think it is. The award recites the contract and refers in terms to the provisions of condition 30. Condition 30 accordingly is incorporated into and forms part of the award just as if the arbitrator had set it out verbatim and had then proceeded to state the construction which he placed upon it. The Court can look at it just as it looked at the answers of the Divisional Court in the *British Westinghouse Co.'s* case (1), at the contract in *Landauer* v. *Asser* (2), and at the pleadings in the *Kelantan* case. (3)

In my opinion this appeal should succeed and an order should be made sending the award back to the arbitrator for him to reconsider and amend so as to bring it into consonance with the true construction of condition 30. The respondents should pay the costs of the appellants of this appeal and of the proceedings in the Courts below.

Lord Wright. My Lords, this appeal arises out of a motion by the appellants to set aside an award as (inter alia) being bad for error in law appearing on its face. There were disputes between the appellants, who were contractors, and the respondents, who were building owners, under a building contract dated November 14, 1928. The appellants had protested that the architect had not issued sufficient certificates for payment as the work progressed and they had suspended the work until the proper amount was certified: the respondents had thereupon given notice to proceed. The appellants disputed that the notice was justified and called for arbitration. In that arbitration the award under consideration was made.

As the motion is to set aside the award for matter appearing on its face, the Court is debarred from considering any matter which does not appear in the award itself or in documents incorporated in it. The award recited the contract between the parties and referred in terms to certain conditions of the contract—namely, clauses 26, 30 and 32; though these clauses are not set out in full, they must, I think, be taken to be incorporated: the award is expressly based on the provisions of clauses 26 and 30, and hence the position here is quite different from that in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (4), where the terms of the contract were held not to be incorporated. Precedents for such incorporation as I find in this case are

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(1) [1912] A. C. 673.
(2) [1905] 2 K. B. 184.
(3) [1923] A. C. 395.
(4) [1923] A. C. 480.

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afforded by *Landauer* v. *Asser* (1) and *Kelantan Government* v. *Duff Development Co.* (2) It appears that pleadings were delivered in the arbitration. As these are not referred to in the award they cannot in strictness be considered; but, as these pleadings were put before this House as well as before the Court of Appeal, I have felt entitled to look at them, and find they confirm the conclusion I reached on the award by itself.

The disputes recited as having been submitted are in regard to (1.) the issue of certificates, and (2.) the validity of the notice served by the architect under clause 26 of the conditions. The arbitrator, in effect, awarded that at the date of the last certificate issued on March 11, 1929, the amount certified was less than the work done (disregarding retention money) by about 793*l.*, but that the certificate was in accordance with the terms of the contract. He further awarded that the notice in dispute was properly given and was valid. The judges of the Divisional Court remitted the award as being unintelligible: I do not agree with this opinion: I think the award is quite clear: the arbitrator obviously took the view that under clause 30, on which he expressly founds, the architect was not entitled to certify 90 per cent. of the work executed or materials actually on the site for use on the works, though that is what the clause in clear terms provides, but only so much of that figure as amounts to a round sum of 1000*l.*, leaving a balance, such as 793*l.* in this case, to be certified when next the figure of 1000*l.* is again reached. In my judgment this is contrary to the clear meaning of the clause and involves an error in law: this is an error apparent on the face of the award. The arbitrator secondly holds that the appellants having suspended work on March 15, 1929, the notice given was valid under condition 26: but condition 26 in terms excludes from the cases when such a notice may be given, any case (inter alia) in which a certificate is withheld or not paid when due, and further provides that the notice shall not be unreasonably or vexatiously given and must

(1) [1905] 2 K. B. 184.

(2) [1923] A. C. 395.

further fulfil certain requisites of form, thus raising a number of issues for decision.

In the Court of Appeal it was held that the award was final and must stand. Both Lords Justices took the view that as the submission necessarily involved questions of the construction of the contract, the award could not be interfered with, even though (a matter on which they expressed no opinion) the arbitrator had manifestly misconstrued the contract.

I think (with deference) that this involves a misconception of the rule stated in *Hodgkinson* v. *Fernie* (1), which they cited. That rule, in my opinion, is not conditioned or excluded because the submission must "necessarily" require for the determination of what is submitted the decision of some question of law. Indeed, the rule presupposes that the decision of some question of law is at the basis of the award, and must have been involved in the submission; otherwise it would be impossible to express the rule as it is stated by Williams J. in his often quoted dictum in *Hodgkinson* v. *Fernie.* (2) After stating the general principle that the parties, having chosen their tribunal, are bound by the arbitrator's decision, he proceeds: "The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award." In *Hodgkinson* v. *Fernie* (1) there was no error of law apparent on the face of the award, but the principle stated has frequently been applied, in particular by this House in the *British Westinghouse Co.* v. *Underground Rys. Co.* (3), where an award was set aside as containing an error on its face. Though it was expressly based on the judgment of a Divisional Court given on a consultative case stated by the arbitrator, this House held that the judgment of the Divisional Court was erroneous in law. Lord Haldane L.C. said (4):

(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.
(2) 3 C. B. (N. S.) 202.
(3) [1912] A. C. 673.
(4) [1912] A. C. 686.

"It was further argued before your Lordships that the arbitrator was in reality made judge of law as well as of fact, and that the well known case of *Hodgkinson* v. *Fernie* (1) was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (1), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well established part of the law of the land."

The rule was again restated with approval by Lord Dunedin giving the opinion of the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Balloo, etc., Co.* (2) I know of no authority that limits its application so as to exclude cases in which a question of law must necessarily arise; indeed, if that were so, the rule would be in effect meaningless. The rule in truth applies to the ordinary case where, in the words of Lord Dunedin (3), the submission refers "to the arbitrator the whole question whether it depends on law or on fact." To be contrasted with such cases there is the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute. Such a case is illustrated by the *Government of Kelantan* v. *Duff Development Co.* (4), where Lord Cave L.C., whose opinion was that of the majority of this House, said (5): "but where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion." This House held in that case that the only questions to be determined by the arbitrator, there being no facts in dispute, were the questions of law as to the construction of the contract. That decision followed *In re King and Duveen* (1), in which Channell J. said, in distinguishing the case of the *British Westinghouse Co.* v. *Underground Electric Rys. Co.* (2): "It is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside." The learned judge shrewdly adds: "otherwise it would be futile ever to submit a question of law to an arbitrator."

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(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

(2) [1923] A. C. 480.

(3) [1923] A. C. 488, 489.

(4) [1923] A. C. 395.

(5) Ibid. 409.

In *Attorney-General for Manitoba* v. *Kelly* (3) Lord Parmoor, delivering the judgment of the Privy Council, repeated and approved the distinction drawn by Channell J.

In my judgment the submission here falls within the rule of *Hodgkinson* v. *Fernie.* (4) There is here no submission of any specific question of law as such and as a specific question of law; no doubt incidentally, and indeed necessarily, the arbitrator will have to decide some questions on the construction of the building contract, but the two matters submitted are both composite questions of law and fact; there is no express submission of the true effect of the contract on the basis of undisputed facts, as in the *Kelantan* case (5), or as a separate and distinct matter on facts to be separately assumed or found, as in *In re King and Duveen.* (1) There is no reason to think that the parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues. Even if questions of law were bound to emerge, the parties may never have envisaged them in going to arbitration. The arbitrator was not being asked simply and specifically to decide, upon some agreed or assumed basis of fact, the true interpretation of either clause 26 or clause 30 of the conditions or of both together; he was being required to make an award on the two matters submitted on whatever questions of fact and law might emerge.

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(1) [1913] 2 K. B. 32, 36.

(2) [1912] A. C. 673.

(3) [1922] 1 A. C. 268, 282.

(4) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

(5) [1923] A. C. 395.

In my judgment this is a case to which the principles of *Hodgkinson* v. *Fernie* (1) apply, so that the Court has inherent jurisdiction to interfere with the award, because I am satisfied that on the face of the award the arbitrator has made an error in law. I think the proper order is to remit the award to the arbitrator with a declaration that the true effect of condition 30 is that the architect was bound, when he found actual work to the value of 1000*l*. duly executed, to certify to the full extent of 90 per cent. of the value of the work so executed and materials actually on the site for use on the works, and accordingly that the notice was not valid under clause 26. He will also reconsider the costs of the arbitration.

The appeal accordingly, in my opinion, should be allowed and the respondents should pay the costs in this House and in the Courts below.

Order of the Court of Appeal and Order of the King's Bench Division thereby set aside Discharged. Cause remitted to the Arbitrator with a Direction to amend his Award so as to make it accord with the true meaning of s. 30 of the Contract as construed by this House and to award costs accordingly. Appellants to have their costs in the Courts below and also their costs of the Appeal to this House.

Lords' Journals, March 3, 1933.

Solicitor for appellants: *Benjamin Wilkinson.*
Solicitors for respondents: *Bentley, Taylor & Co.*

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(1) 3 C. B. (N. S.) 189; 27 L. J. (C. P.) 66.

[HOUSE OF LORDS.]

H. L. (E.)* LORD GLANELY . . . . APPELLANT;

1933

AND

March 14. WIGHTMAN . . . . RESPONDENT.

Revenue—Income Tax—Stud Farm—Stallion Fees—Profits in respect of the Occupation of Land—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule B*; *Schedule D, ss.* 1 *and* 2; *Cases I., VI.*

The appellant was the owner of a stud farm near Newmarket which was devoted to the purposes of breeding and racing horses. Among the stud was a stallion, a former winner of the Derby, which never left the farm, but was visited by, and served, mares of other owners. From these services of the stallion the appellant received profits, though the business of the farm as a whole was conducted at a loss:—

Held, that the fees were profits in respect of the occupation of the farm and were chargeable to income tax under Schedule B, and not under Schedule D.

Malcolm v. *Lockhart* [1919] A. C. 463 distinguished.

McLaughlin v. *Bailey* [1920] 2 I. R. 310; 7 Tax Cas. 508 disapproved.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal (1) dismissing an appeal from an order of Rowlatt J. (2), who, upon a Special Case stated by the Commissioners for the Special Purposes of the Income Tax Acts, had affirmed the decision of the Commissioners to the effect that the Right Honourable Lord Glanely, the appellant throughout the proceedings, who was the owner and occupier of a stud farm at Exning, near Newmarket, was in the years 1921–1922 and 1926–1927 liable to be assessed to income tax under Schedule D in respect of profits which he derived from stallion fees, notwithstanding the fact that he was already assessed under Schedule B in respect of the occupation of land as occupied in part for agricultural purposes and in part for stud and racing purposes.

In 1919 the appellant acquired Exning House, Newmarket, and the stud farm attached to it. In 1923 he acquired an adjoining stud farm called North End. The area of the two farms together was about 888 acres, including stud paddocks 284 acres, agricultural pasture land 59 acres, arable land 357 acres, woodland belts and waste land 100 acres, and also a house, gardens and park.

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* *Present:* VISCOUNT BUCKMASTER, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(1) [1932] W. N. 194.

(2) [1931] W. N. 160.

The appellant had in 1917 bought a yearling named Grand Parade. This horse won the Derby in 1919. At the end of that year's racing he was sent to the stud. At all material times Grand Parade has stood at the stud farm adjoining Exning House.

The property contains about forty paddocks, each of which is surrounded by a double belt of trees, and each of which, except that allotted to Grand Parade, is enclosed by a post and rail fence. Grand Parade's paddock is bounded by a close-boarded fence. Each paddock has a supply of water laid on. When paddocks become stale they are grazed by the appellant's bullocks, and other paddocks are used for the horses. There are about 105 horse-boxes on the property, constructed of concrete and wood, and lit some by gas and others by electricity.

The number of the staff employed at Exning in 1926 was forty-one. In addition to this about twenty-three were employed in the racing stables. There were also a trainer, a manager and a secretary. The trainer is also a veterinary surgeon. The manager has a general superintendence over the whole establishment, and has authority over all the servants on the staff. The secretary has charge of the various books of account.

The total capital outlay on the Exning property, with the bloodstock and everything thereon, was about 250,000*l*.

The produce grown on the arable land is used for the most part on the stud farm. The wheat grown is sold, but the straw is converted into manure by the bullocks and by pigs kept mainly for that purpose. The manure is used for dressing the paddocks and for growing crops on the farm. The beasts and bloodstock on the farm are not fed entirely on the produce of the land. The bullocks are fattened and sold in the winter.

The appellant buys stallions and mares mostly as yearlings; a few mares are bought as brood mares when in foal. The bloodstock animals owned by him in each of the four years ending on March 31, from 1923 to 1926, varied from 142 to 171. During the same period he kept from fifty-one to sixty-three mares and from four to six stallions, besides a number of foals and yearlings.

Success in breeding thoroughbred horses can only be attained by submitting them to the test of the racecourse in order to find out whether they possess the necessary speed and stamina, and also to ascertain the value of stallions and mares for producing high-class progeny. Only by successful racing of the progeny of a stallion can the fee for his services be maintained. In some instances the owner of the stud does not race the horses himself, but their qualities are tested by purchasers; but these cases are exceptional.

It is not conducive to successful breeding to send a mare every year to the same stallion; better results are obtained by sending the mare to different stallions in different years. Further, in course of time after the fillies bred at the breeding stud have finished their racing career, they return to the breeding stud; but it sometimes happens that, owing to close relationship to the stud stallions, they cannot be mated with any of them for fear of the ill-effects of inbreeding. Consequently it is sometimes necessary to procure for the appellant's mares the services of stallions belonging to other owners, for which fees are paid, or for which the services of stallions belonging to the appellant are given in exchange. In these cases the appellant, in addition to the fees for the stallion, pays for the keep of his mares at the stud visited and the necessary travelling expenses.

A mature stallion should serve thirty to forty mares each season. The appellant advertises his stallions, with the charges for the services of each, in the Racing Calendar and the sporting papers. He also issues a card each year with particulars of his stallions, mares, horses in training, yearlings and foals.

Thoroughbred stallions must stand at a properly equipped stud farm. It is not practicable to send them about the country to serve the mares of other owners. The owner of stallions must therefore either occupy sufficient land to accommodate the stallions and the visiting mares, or the stallions must stand at some other similarly equipped breeding establishment.

A stud as large as the appellant's requires many paddocks for the accommodation of the visiting mares and the owner's own mares. A number of spare paddocks and loose boxes is also needed.

The mares of other owners which are served by the appellant's stallions arrive at the farm some time before service, and remain there about four months. They generally arrive in foal so that they may be served after foaling. They need careful attention while on the farm. They come from other parts of the country, and also from Belgium, France and Germany. The appellant receives payment for the keep of these mares over and above the service fees.

In the year 1922 four of the appellant's stallions served at the stud farm forty of the appellant's mares and eighty-seven visiting mares. In 1923 six of the appellant's stallions served forty-three of the appellant's mares and sixty-one visiting mares. In 1927 three stallions served thirty-seven of the appellant's mares and seventy-eight visiting mares.

The service fees received by the appellant (exclusive of any estimate in respect of services of other stallions accepted by the appellant in exchange for services rendered by his stallions) were in 1920–1921 4011*l.* 14*s.*, and in 1925–1926 18,586*l.* 19*s.* These fees formed one item only among the receipts of the undertaking carried on by the appellant, which as a whole resulted in a loss. The loss in the three years ending on March 31 were respectively—in 1924, 19,419*l.*; in 1925, 7207*l.*; and in 1926, 18,534*l.* Except in the year when Grand Parade won the Derby the appellant has always engaged in horse breeding and racing at a heavy loss to himself.

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An assessment was made upon the appellant under Schedule D of the Income Tax Act, 1918, for the year ending on April 5, 1922, in the sum of 15,000*l*., and two similar assessments were made upon him for the year ending April 5, 1927, in the sums of 2000*l*. and 13,000*l*. respectively. These assessments were made upon the appellant in respect of profits derived from stallion fees.

He appealed to the Commissioners for the Special Purposes of the Income Tax Acts. At the hearing before the Commissioners the appellant contended :—

(1.) That any profit derived by him from stallion fees was covered by the assessment under Schedule B of the Income Tax Act, 1918 (1), upon the lands in his occupation, and that the assessments should be discharged.

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(1) The Income Tax Act, 1918, Schedule B, provides as follows :—

"Tax under Schedule B shall be charged in respect of the occupation of all lands, tenements, hereditaments, and heritages in the United Kingdom for every twenty shillings of the assessable value thereof estimated in accordance with the rules of this Schedule.

In this Act the expression 'assessable value' means in relation to tax under this Schedule an amount equal to twice the annual value of the lands, tenements, hereditaments, or heritages, or, in any case in which it is proved to the satisfaction of the commissioners concerned that any person occupying any lands and assessed to tax in respect thereof is not occupying those lands for the purpose of husbandry only, or mainly for those purposes, and the Board of Agriculture and Fisheries on a reference to the Board by the Commissioners of Inland Revenue do not certify that the use of the lands by the occupier thereof for a purpose other than the purpose of husbandry is unreasonable, an amount equal to the annual value" . . . .

By s. 23, sub-s. 1, of the Finance Act, 1922 (12 & 13 Geo. 5, c. 17): "The definition of the expression 'assessable value' in Schedule B of the Income Tax Act, 1918, shall have effect as though for the words 'an amount equal to twice the annual value' there were substituted the words 'an amount equal to the annual value' and as though for the words 'an amount equal to the annual value' there were substituted the words 'an amount equal to one-third of the annual value.'"

Schedule D of the Income Tax Act, 1918, is as follows :—

Sect. 1: "Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing—

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and

(ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere" . . . .

(2.) Alternatively, that the stallion fees could not be treated as a separate subject of assessment, but must be treated as part of a composite undertaking of breeding and racing horses, which was a concern in the nature of a trade, and that, inasmuch as there was a loss in this trade, the assessments should be discharged.

It was contended on behalf of the Crown :—

(1.) That the profit derived by the appellant from stallion fees was not covered by the assessment under Schedule B on the land in his occupation;

(2.) That breeding and racing were not carried on by the appellant on commercial principles, and were not a trade or concern in the nature of trade; but

(3.) That the letting out of the services of the stallions was carried on by the appellant on commercial lines, and that the profits derived therefrom were separable from the enterprise as a whole, and were profits of a trade, adventure, or concern in the nature of trade assessable under Case I. of Schedule D, or alternatively were other annual profits assessable under Case VI.

With regard to the appellant's first contention, the Commissioners held that they were bound by *McLaughlin* v. *Bailey* (1), which in their view was supported by *Malcolm* v. *Lockhart* (2), to hold that the stallion fees were not covered by the assessment under Schedule B, but that the letting out of the stallion's services for fees was separable from the rest of the appellant's adventure, and that the profit therefrom was assessable under Schedule D.

Upon a Case stated at the instance of the appellant for the opinion of the King's Bench Division, Rowlatt J. affirmed

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Sect. 2: "Tax under this Schedule shall be charged under the following cases respectively; that is to say,—

Case I.—Tax in respect of any trade not contained in any other Schedule . . . .

Case VI.—Tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other Schedule;

and subject to and in accordance with the rules applicable to the said cases respectively."

(1) [1920] 2 I. R. 310; 7 Tax Cas. 508.

(2) [1919] A. C. 463.

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the decision of the Commissioners. (1) On appeal to the Court of Appeal (Lord Hanworth M.R. and Slesser L.J.; Romer L.J. dissenting), the decision of Rowlatt J. was affirmed. (2)

Hence this appeal.

Feb. 21. *Wilfrid Greene K.C.* and *Cyril L. King* for the appellant. The difficulty in this case has arisen through a misconception of the effect of the decision of this House in *Malcolm* v. *Lockhart* (3), which led the Court of Appeal in Ireland in *McLaughlin* v. *Bailey* (4), the facts of which cannot be distinguished from those in the present case, to decide in favour of the Crown. That case has been followed by the Commissioners, and their decision has been supported by Rowlatt J. and by a majority in the Court of Appeal.

The question before the House is whether fees paid to the appellant for the services of his stallion, Grand Parade, are profits which have accrued to him "in respect of the occupation of land," or whether they are separate from and independent of the occupation of land. If they are in respect of the occupation of land they fall to be taxed under Schedule B, and the appellant has already been taxed in respect of them. If they are not in respect of the occupation of land they fall under Case I. or Case VI. of Schedule D, and he is liable to be taxed under one or both of those provisions.

All profits which naturally flow from the occupation of land are properly covered by an assessment under Schedule B; for example, a potato grower's profits: *Back* v. *Daniels* (5), or the profits of a poultry farm in the ordinary sense of the words, where the fowls are produced and maintained on the farm: *Lean* v. *Ball* (6); *Jones* v. *Nuttall*. (7) The same would apply to the profits of a fruit farmer or profits from sales of wheat, barley, oats, roots, or any other produce of an agricultural farm, or from the sale of milk, the produce of a dairy farm. Sometimes the profits of a business or occupation are severable and may be classified as those which are in respect of the occupation of land and those which accrue from other sources, as in *Carlisle and Silloth Golf Club* v. *Smith* (1), where green fees paid by visitors were held to be severable from the income which the club received from the subscriptions of members and to be taxable under Schedule D. The question in this case is whether fees for the services of a thoroughbred stallion bred or reared on a stud farm are profits in respect of the occupation of the stud farm.

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(1) [1931] W. N. 160.
(2) [1932] W. N. 194.
(3) [1919] A. C. 463.
(4) [1920] 2 I. R. 310; 7 Tax Cas. 508.
(5) [1925] 1 K. B. 526.
(6) (1925) 10 Tax Cas. 341.
(7) (1926) 10 Tax Cas. 346.

It is submitted that they plainly are. The sheep and lambs on a sheep farm are the product of the farm, and an assessment under Schedule B covers the profit which the occupier derives from the farm: *Keir* v. *Gillespie.* (2) A colt by Grand Parade out of one of the appellant's mares would as surely be a product of the farm as a basketful of apples is the product of a fruit farm. If that colt were sold the price would be a profit in respect of the occupation of land. If instead of covering one of the appellant's mares the stallion serves the visiting mare of another owner, and the appellant receives a fee for the service instead of the price of a foal, by what process of reasoning is the price taxed under Schedule B and the fee under Schedule D ? Again, if one of the appellant's mares should produce a foal by the stallion of another owner, the foal would be the product of the appellant's farm and its price, if it were sold, would be a profit in respect of the land and taxable under Schedule B ; but, it is said, the fee for serving another owner's mare is taxable under Schedule D. In other words the productive capacity of the male is to be taxed under one schedule, while that of the female falls under another schedule. That line of argument leads to an absurdity.

Malcolm v. *Lockhart* (3) has been erroneously taken to have decided that fees charged for the services of a stallion off the owner's farm are severable from other profits of the farm, and are taxable under Schedule D. In fact the services were rendered off the farm, and that fact is enough to distinguish *Malcolm* v. *Lockhart* (1) from the present case, but the real difference between the cases is that in *Malcolm* v. *Lockhart* (1) the farm was an agricultural farm: see *Malcolm* v. *Inland Revenue.* (2) Supplying the services of a stallion is no part of the business of an agricultural farmer, and the fees for those services were easily severable from the profits of the farm. The case of a stud farm is quite different. In the present case the land is cultivated and used exclusively for the breeding and racing of horses, just as land may be cultivated and used for the production and sale of trees or crops; the produce of the arable land is used on the farm and in the stables; the straw is converted into manure for dressing the forty paddocks; the belts of woodland afford shelter for the horses. Of the 888 acres only a negligible quantity is devoted to purposes other than the breeding and training of horses.

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(1) [1913] 3 K. B. 75.
(2) 1920 S. C. 67 ; 7 Tax Cas. 473.
(3) [1919] A. C. 463.

In *McLaughlin* v. *Bailey* (3) the farm was, like that in the present case, a stud farm, to the consideration of which *Malcolm* v. *Lockhart* (1) was irrelevant. *McLaughlin* v. *Bailey* (3) was decided upon a misunderstanding of *Malcolm* v. *Lockhart* (1), and ought not to be approved.

Feb. 23. *Sir Thomas Inskip A.-G.* and *Reginald P. Hills* for the Crown. The House can only give effect to the appellant's argument by overruling a number of authorities.

The appellant occupies the land at Exning for three purposes or in three interests: breeding, racing, and letting out the services of his stallion. The Commissioners have found that the last mentioned interest is severable from the other two, and this is matter of fact which they are the tribunal to decide. They have also found that this thirdly mentioned interest is one the profits of which are taxable under Schedule D, and are not covered by the assessment under Schedule B. Now whether a profit made out of the use of land is or is not covered by an assessment under Schedule B is largely a question of the extent or degree to or in which the land contributes to the nature of the product which brings in the profit. The fact that the profit is made on land is not of itself enough to exempt it from taxation under Schedule D. All factories and business premises are erected upon land. In order that the profit may fall under Schedule B it is necessary that the land shall enter into the product which when sold produces the profit. The profit must be made " by means of, or in reference to, land which he "—the taxpayer—" occupies " : per the Lord President, Lord Clyde, in *Marshall* v. *Tweedy*. (1) The question is to what extent the product owes its existence to the use of the land. A fruit farmer selling his fruit to the proprietors of a jam factory would be taxable under Schedule B for the profits on his sales ; but if he carried on the business of a jam factory himself he might be taxed under Schedule D for the profits of that business. A dairy farmer selling milk to a dairyman would be taxable under Schedule B, but he would certainly be taxable under Schedule D if he himself carried on a dairyman's business elsewhere, and probably even if he carried on such a business upon the land itself. In short the question whether the profit falls under Schedule B or Schedule D is a question of degree, and therefore, like the question of severability, a question of fact for the Commissioners; and unless it can be shown that they have misdirected themselves, their finding should stand. In *Malcolm* v. *Lockhart* (2) the Commissioners for the General Purposes of the Income Tax Acts had held that fees for services of a stallion off the owner's farm were assessable under Schedule D. No distinction is drawn in the judgments of the noble and learned Lords between agricultural farms and stud farms. Lord Buckmaster said (3) : " This question is essentially a question of fact ; the Commissioners in this case have decided that the use by the appellant of this stallion is a use that provides a profit which does not arise in respect of the occupation of his lands," and his Lordship went on to say that the facts were " abundant to justify the conclusion

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(1) [1919] A. C. 463.

(2) 1918 S. C. 81.

(3) [1920] 2 I. R. 310; 7 Tax Cas. 508.

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(1) (1926) 11 Tax Cas. 524, 532.
(2) [1919] A. C. 463.
(3) [1919] A. C. 466.

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which has been reached." In *Earl of Jersey's Executors* v. *Bassom* (1) the matter in question consisted of fees received by the Earl of Jersey for the services of his stallion Greenback. The Commissioners for the Special Purposes of the Income Tax Acts had assessed the Earl under Schedule D. Rowlatt J. held that the question was one "of fact and of degree." (2) It cannot be disputed that there is a difference between increasing one's own bloodstock and increasing the bloodstock of another, nor can it be denied that fees for promoting the latter end may readily and reasonably be severed from profits derived from attaining the former. Serving the mares of other owners was found in *Malcolm* v. *Lockhart* (3) to provide a profit which did not arise in respect of the occupation of land by the owner of the stallion. That was the principle of *Malcolm* v. *Lockhart* (3) which, being a decision of this House, is binding, and was rightly and properly followed by the Court of Appeal in Ireland in *McLaughlin* v. *Bailey*. (4)

Feb. 24. *Wilfrid Greene K.C.* was heard in reply.

The House took time for consideration.

March 14. VISCOUNT BUCKMASTER. My Lords, the question arising on this appeal is whether the appellant is liable to income tax in respect of payments made to him for the service by his stallions of mares sent to his stud by outside owners. He was assessed in respect of these figures for the year ended April 5, 1922, and for the year ended April 5, 1927; these assessments were, upon appeal, confirmed by the Special Commissioners, their decision being supported by Rowlatt J. and by a majority of the Court of Appeal, Romer L.J. dissenting.

The facts of the case are these. The appellant in 1919 acquired a house known as Exning House, near Newmarket, and the stud farm attached to it, and subsequently an adjoining stud farm called North End. Upon this land he has established a stud farm, and in substance the whole of the area, amounting to 888 acres, is used for

(1) (1926) 10 Tax Cas. 357.
(2) Ibid. 371.
(3) [1919] A. C. 463.
(4) [1920] 2 I. R. 310; 7 Tax Cas. 508.

and in connection with the stud. Upon this farm he breeds thoroughbred stock, and uses his stallions both for the purpose of serving his own mares and the mares of other people brought into his farm for the purpose. No mares are served outside the farm. He advertises his stallions, with the fees charged for the service of each, and, roughly speaking, twice as many visiting mares are served as his own. It is for the fees in respect of the services for these outside mares that the assessment has been made. The mares themselves remain on the farm for about four months, and the appellant receives payment for their keep during the time.

The appellant's claim is that he is only liable to be taxed under Schedule B in respect of his occupation of the land, and that the profits derived from the use of the stallions are not profits of a trade, adventure or concern separate from and outside the purpose of such occupation.

It is as well to consider this contention in the first instance, apart entirely from questions of authority. It is not disputed by the Crown that the occupation of the land for the purposes of the stud farm is an occupation within the meaning of Schedule B, the terms of which contain no qualification of the occupation to which it refers. It is, of course, obvious that in some sense land is occupied for every purpose of trade, but I think it is plain that the occupation referred to in the Schedule is an occupation which, in itself and by its enjoyment, is the source of the income and profits to be taxed. Nor is such occupation limited to the purpose of husbandry, as is shown by the later part of the rule.

Now a stud farm is plainly an occupation of the land, and the breeding and sale of foals arises from that occupation, and for that purpose the use of the stallion is as indispensable as the use of the mare. The services, therefore, of the stallion upon the land are as much a breeding operation as the production of the foal by the mare, and I find it difficult to see why, when other people's mares are sent on to the farm, and kept there, the payment for the services of the stallion is not a normal part of the purposes for which the land is occupied and inseparable therefrom.

This is the argument which has found favour with Romer L.J., and I think it is sound.

It is then said that none the less the matter is covered by authority. Of the earlier case, known as *Lord Derby's* case (1), although the point might have been raised, in fact it was not, and that case and the subsequent one, *Earl of Jersey's Executors* v. *Bassom* (2), afford no help. Nor, in my opinion, does the case of *Carlisle and Silloth Golf Club* v. *Smith.* (3) In that case, all the fees paid by strangers for the use of the golf club were held liable to tax upon the distinct ground that these fees related to a trade or enterprise entirely separable from the use of the land by the members of the golf club. The judgments of the Court were clearly confined to this issue, and offer no assistance here.

The case most nearly approaching the present is *Malcolm* v. *Lockhart* (4), and it is a case that requires careful and critical examination since, if it establishes the principle for which the respondent contends, the authority binds this House. In that case land was occupied as an ordinary farm, although, in addition to 400 sheep, the occupier bred a stud of Clydesdale horses. A stallion which he used upon his farm was let out and taken round the country, where it served the mares of the adjoining farms and other people who required its services. Assessment was made in respect of the profits earned by these outside services, and it is plain from the findings of fact in that case that it was only the moneys so received that it was sought to tax. The Court of Session (5) treated the case upon the hypothesis that the land was occupied as an ordinary farm, and that the use of the stallion outside it was outside the purpose of this occupation. The Lord President said (6): "If the farm lease terminated to-morrow, then he"—the farmer—"would, if, as I presume, it was for his profit, certainly continue to carry on this business." And Lord Johnston stated that the employment of a stallion for stud purposes for hire outside of his own farm is no part of the business of a farmer. He says (1): "A stallion kept for this purpose has no necessary relation to a farm or to the adventure of a farmer." It was in these circumstances that the matter came before your Lordships' House, where the real question argued was whether there was any reason to displace the finding of fact of the Commissioners that the employment of a stallion for stud purposes for hire outside his own farm is no part of the business of a farmer.

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(1) *Earl of Derby* v. *Aylmer* [1915] 3 K. B. 374.

(2) 10 Tax Cas. 357.

(3) [1913] 3 K. B. 75.

(4) [1919] A. C. 463.

(5) 1918 S. C. 81.

(6) Ibid. 84.

It would not be possible for this House to question that decision, but I see no reason why it should be open to question notwithstanding the fact that the farmer there did breed on his own land. The whole case was based upon the occupation of the land being for ordinary farm purposes, and there was no reason to displace the finding of the Courts that the sale of the services of the stallion when taken round the countryside formed no part of that business.

The case of *McLaughlin* v. *Bailey* (2) does, I think, cover this case; but it was based upon the view of *Malcolm* v. *Lockhart* (3), which I think was mistaken. The phrase there used which contrasts the use of a horse in connection with a farm with its use outside, ought to be construed in its widest sense and must be interpreted in the light of the finding of facts by the Commissioners that there was a farm business for which the land was occupied, and that the use of this stallion was for a separable and distinct purpose.

I do not think, therefore, that *Malcolm* v. *Lockhart* (3) disposes of this case. Each case must depend upon its own special circumstances. The occupation of the land in the present instance being for the purpose of a stud farm, the use of the stallion upon the farm cannot be taxed unless it can be said that it constitutes something distinct and separable from the purpose of the occupation, and I find myself unable to accept this view.

I think, therefore, that this appeal must be allowed, and the assessment discharged.

(1) 1918 S. C. 85.
(2) [1920] 2 I. R. 310; 7 Tax Cas. 508.
(3) [1919] A. C. 463.

LORD TOMLIN. My Lords, the conclusion reached by Rowlatt J. and the majority of the Court of Appeal in this case is one which, with respect, I cannot accept.

It is not disputed that the occupation of land for the purposes of a thoroughbred stud farm is an occupation the profits of which are covered by an assessment under Schedule B, and that in respect of such occupation no claim founded upon Schedule D could arise.

Further, it is not suggested that the stud farmer would have to account under Schedule D for the proceeds of sale of a foal from any of his mares whether covered by a stallion of his own or by one belonging to another, yet it is contended he must account under that schedule if his profit takes the form of a fee for allowing his stallion to cover the mare of another.

Looking at the matter apart from authority, I can see no reason in logic for distinguishing between the profit derived from the reproductive capacity of the female and the profit derived from the reproductive capacity of the male.

So far as authority is concerned, the question is what was the basis of the decision in your Lordships' House in the case of *Malcolm* v. *Lockhart*? (1) It rested, I think, upon the fact that the occupation of the land in that case was not an occupation for the purposes in relation to which the fees were received, and that the fees were therefore received in respect of a trade, adventure or concern separate from and outside the purposes of the occupation.

I concur in the views which have already been expressed upon that decision by the noble and learned Viscount on the Woolsack.

The decision appears, therefore, to have been too broadly interpreted in *McLaughlin* v. *Bailey* (2), and I see nothing in it to prevent your Lordships from reaching the conclusion which appears to be required, that the fees in question in the present case arise from the occupation of the land and are not taxable under Schedule D.

I concur in the motion proposed.

(1) [1919] A. C. 463.

(2) [1920] 2 I. R. 310; 7 Tax Cas. 508.

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Lord Russell of Killowen. My Lords, but for the fact that we are adopting a view contrary to those which were entertained by Rowlatt J. and the majority in the Court of Appeal, I would have been well content merely to agree with the opinion expressed from the Woolsack. In the existing circumstances, however, I desire to add a few words of my own.

All those portions of the appellant's lands which are occupied and used by him for the purpose of a thoroughbred stud farm have been assessed to income tax under Schedule B. In other words, the appellant has thereby been assessed to tax upon his gains in respect of his occupation of the land which he occupies for that purpose, and solely for that purpose.

It was conceded by the Crown, and necessarily conceded, that the normal receipts of a thoroughbred stud farm include stud fees received for the service by the stud farm stallions of mares which belong to other people and which are brought on to the stud farm for that purpose. Those stud fees are therefore in my opinion part of the gains of the appellant in respect of his occupation of this land.

By what right can the Crown then claim to pick out one item from the various gains of the appellant in respect of that occupation, and say that it is not covered with the other gains by the assessment under Schedule B but is available as a separate item for a separate assessment under Schedule D? I can envisage no principle which would justify such a course, nor is it supported by any authority except the case of *McLaughlin* v. *Bailey* (1), which, as has already been pointed out, is based upon a mistaken view of the decision in *Malcolm* v. *Lockhart*. (2)

These stud fees are in my opinion merely one item among the gains of the appellant in respect of his occupation of the lands and are, with all such gains, franked by the assessment under Schedule B.

I find myself in agreement with Romer L.J. and would allow this appeal.

(1) [1920] 2 I. R. 310; 7 Tax Cas. 508.

(2) [1919] A. C. 463.

LORD WRIGHT. My Lords, the appellant, who owns and occupies a stud farm near Newmarket for the breeding of thoroughbred racing stock, not only uses the stallions he maintains for covering his own mares, but also charges fees for letting out the services upon his stud farm of these stallions to the thoroughbred mares of other owners. In addition to being assessed under Schedule B in respect of the lands comprised in the farm, he has also been separately assessed under Schedule D in respect of these fees. The question in this appeal is whether this additional assessment is justified, that is, whether these fees are or are not covered by the general assessment made on the lands under Schedule B.

Thoroughbred stallions cannot be sent round, like shire stallions, to the farms where the mares to be served are kept. The thoroughbred mares must be brought (generally just before foaling) to the stud farms where the thoroughbred stallions live, and remain there for about four months in all, partly before being served and partly afterwards. During this time the visiting mares need the same care as the appellant's own mares, and the use of the farm lands and of the same equipment in the way of boxes, paddocks and so forth. The appellant's stud farm comprises 888 acres, of which the stud paddocks form 284 acres, the pasture land 59 acres, the arable land 357 acres, and woodland belts about 100 acres. The paddocks, which are forty in number, are run on by horses and bullocks alternately, the rotation being necessary to prevent them from becoming horse sick, and are limed every two years. The woodland belts shelter the paddocks. The arable land provides straw for conversion into manure by the bullocks and by pigs kept for that purpose. The whole area is necessary for the stud farm: it is assessed as a whole under Schedule B, the agricultural part at single annual value rates, and the land used purely for stud and racing purposes at one-third of the annual value. There were kept on the farm about 140 to 170 horses owned by the appellant, including six stallions. Of these the most famous was Grand Parade, the Derby winner of 1919, which commanded a service fee for visiting mares of 400 guineas. As a stallion needs for purposes of health to serve mares about thirty or forty times in the year, Grand Parade (to take him as an example) could be and was in fact used not only to serve the appellant's mares, but also other people's or visiting mares; thus in 1924 he served thirteen of the former and twenty-nine of the latter, and in 1927 eighteen of the former and eighteen of the latter. Sometimes the appellant, in order to introduce new blood, sent his mares to be served by stallions of other owners, and by way of exchange served by his stallions the mares of those other owners; such exchanges are common in the case of stud farms, and no fees are then charged on either side. The service fees received by the appellant amounted in 1923 to 11,370*l.*, in 1924 to 15,232*l.*, and in 1925 to 18,586*l.*

The appellant, whose total capital outlay on and about the property, including bloodstock, was in round figures about 250,000*l.*, has made each year a heavy loss in the whole of his breeding and racing activities, even after bringing into account the service fees; in some years the loss has amounted to as much as 18,000*l.* or 19,000*l.* A single account has been kept of all the activities of the farm. The respondent, besides claiming that there should be a separate assessment under Schedule D in respect of the service fees (including the value of the stallions' services exchanged), also claimed that these services could be severed as matters of account from all the other matters included in the accounts; on any other view there would be no profits of the stud farm on which to tax, apart, that is, from the arbitrary assessment under Schedule B on the basis of annual value.

On the latter issue he has succeeded before the Commissioners, the Revenue Judge and the Court of Appeal, and the point has not been contested further before this House, as being covered by concurrent findings of fact. No more need be said about it here, except that, whether rightly so decided or not, it throws no light on the question now debated—namely, whether the service fees are or are not covered by Schedule B. On that issue the Commissioners stated all the relevant facts and then decided the case on the footing that they were bound to decide adversely to the appellant by a decision of the Court of Appeal in Ireland: *McLaughlin* v. *Bailey.* (1) The question is thus left to the decision of the Court on the specific facts found as a question of the construction of the Act. The decision of the Commissioners was upheld by Rowlatt J. and by the majority of the Court of Appeal; Romer L.J., however, dissented.

The tax under Schedule B is expressed to be charged in respect of the occupation of lands, tenements and hereditaments in the United Kingdom for every twenty shillings of their assessable value. It is, like other taxes under the Income Tax Act, 1918, a tax on income or profits; but, save in the special cases otherwise provided by the Act, it is a tax not varying with the actual profits or depending on there being profits at all, but the amount of the tax is fixed by relation to the arbitrary or conventional standard of the annual value. In this respect it resembles the landlord's or property tax under Schedule A, which also is on the annual value. There is, under the Income Tax Acts, only one tax; there are not as many taxes as there are schedules, but the schedules are merely the different ways of collecting it. This was clearly set forth by Lord Dunedin in his speech in *Fry* v. *Salisbury House Estate, Ld.* (2), where he quotes and relies on the well known judgment of Lord Macnaghten in *London County Council* v. *Attorney-General.* (3) Lord Dunedin further points out that "once assigned to its appropriate Schedule, the same income cannot be attributed to another Schedule." (4) This House held in *Fry* v. *Salisbury House Estate, Ld.* (5), which was a case under Schedule A, that the tax was exhaustive in respect of all the profits that flowed from the ownership of the land; the landowners had let the buildings in flats; a claim to tax the same land further under Schedule D failed, being based on the ground that as the profits of the letting exceeded the annual value the excess was taxable separately as profits of a business under Schedule D. In the same way the appellant in this case has been assessed under Schedule B in respect of the occupation of the land as a whole (it is immaterial for this purpose whether the assessment is on the basis of the whole or of one-third of the annual value), and accordingly no further tax can be levied in respect of the farm unless it is shown that he is there conducting some "separate and distinct operation unconnected with the occupation of the land," to use the words of Scrutton L.J. in *Back* v. *Daniels*. (1) If this were shown, a further tax could no doubt be levied under Schedule D, Case I. or VI., as was admitted to be proper in *Fry's* case (2) in respect of the trifling services (for which a small extra charge was made) outside the actual letting of the flats. On the special facts of the case it was similarly held in *Coman* v. *Governors of the Rotunda Hospital, Dublin* (3), that the owners of the hospital, a charitable institution, were taxable under Schedule D on the profits of giving the use of rooms for entertainments with equipment, lighting and other accessories; they were held to be carrying on a business for profit outside their status as owners of the land. The question here is accordingly whether the fees charged for the service of the stallions constitute a matter outside whatever is included in "occupation." Schedule B exhausts all profits that come within occupation of the land; such profits are dealt with once for all by the assessment and cannot be taxed otherwise or again: Schedule D has no application to such profits. The Act does not define "occupation," but does throw some light upon its meaning: thus it distinguishes occupation only or mainly for husbandry from occupation not so described, though both are within Schedule B. The Act excludes from Schedule B not only dwelling-houses, other than farm houses, but warehouses or other buildings occupied for the purpose of carrying on a trade or profession (r. 1 (*b*)), indicating thereby that the income from "occupation" has reference to use of the lands

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(1) [1920] 2 I. R. 310; 7 Tax Cas. 508.

(2) [1930] A. C. 432, 441.

(3) [1901] A. C. 26.

(4) [1930] A. C. 442.

(5) [1930] A. C. 432.

(1) [1925] 1 K. B. 526, 544. (2) [1930] A. C. 432.
(3) [1921] 1 A. C. 1.

as such. This would exclude from Schedule B and throw into Schedule D income from trades, professions and factory operations, although the buildings in which they are exercised do occupy some land. Rule 5 under Schedule B gives to a person occupying lands for purposes of husbandry only an option to be assessed under Schedule D, and r. 6 likewise gives such a person who has been charged under Schedule B a right to be charged only on his actual profits of the year if he can show they fell short of the assessable value. Rule 7 gives a person occupying woodlands the option in certain circumstances of being charged under Schedule D rather than Schedule B. It is to be noted that these options are given to the taxpayer, not to the Crown. Rule 8 contains special rules for the assessment of lands occupied as nurseries or gardens for the sale of the produce. Rule 4 of Case III. under Schedule D is the only express provision for an assessment under Schedule D in addition to that under Schedule B; that rule applies to cases where a dealer in cattle or in milk occupies lands which are insufficient for the keep of the cattle brought on the lands. It seems to follow that but for this express provision the Schedule B assessment would have covered all the profits in that case.

If authority were needed, the provisions just quoted do at least show that profits of "occupation" include gains from the animal produce as well as the agricultural, horticultural or arboricultural produce of the soil. And the references to gardens, nurseries and woodlands show a scope of Schedule B beyond the use of the land and its products for the provision of food; equally it is obvious that the rearing of animals, regarded as they must be as products of the soil—since it is from the soil that they draw their sustenance and on the soil that they live—is a source of profit from the occupation of land, whether these animals are for consumption as food (such as bullocks, pigs or chickens), or for the provision of food (such as cows, goats or fowls), or for recreation (such as hunters or racehorses), or for use (such as draught or plough horses). All these animals are appurtenant to the soil, in the relevant sense for this purpose, as much as trees, wheat crops, flowers or roots, though no doubt they differ in obvious respects. Nor is it now material towards determining what are products of occupation that farming has developed in its use of mechanical appliances and power, not only in such matters as ploughing, reaping, threshing, and so forth, but in such ancient methods of preparing its products as making cream, butter or cheese. The farmer is still dealing with the products of the soil, and Schedule B covers the income. Hence the elaborate, expensive and scientific equipment of the appellant's stud farm is not adverse to his claim that the profits (if any) are exhaustively covered by Schedule B. But in the present case these points need not be laboured, because it is admitted by the respondent that the land as a whole is properly assessed, as in fact it was, under Schedule B.

The question thus arises on what principle the respondent claims to assess the services of the stallions in relation to the mares sent by other owners as separate profits or income not covered by Schedule B but taxable under Schedule D. It is clearly not relevant to say that what is in question is the receipt of fees and not the services for which they are paid, any more than a distinction can be drawn in the case of an ordinary farmer between the produce which he uses on the farm and the produce which by selling he turns into money. In fact, the services of the stallions are exactly the same in respect of visiting mares as in respect of the appellant's own mares, and exactly the same care has to be taken in the paddocks and boxes in the case of the visiting mares (while they remain at the farm) as in the case of his own mares. The fee which is received for the covering of the visiting mares corresponds to the gain which the appellant has, or at least hopes to have, in respect of the foals of his own mares. But I think the similarity is deeper than that. The profit or income is in truth from the reproductive capacity of the animal, and it is that which has the money value, however realized, whether in cash or in kind. There is a natural tendency to think only of the procreative activity of the female animal, the mare, and to ignore that of the male,

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the stallion. In the former case the foal is delivered from the mare after a prolonged period of gestation; in the case of the stallion the service is of brief duration, but it involves the use of the stallion's generative capacity, a use which will only be exercised about thirty or forty times in a year, and to the fulfilment of which there has gone all the care lavished in the stallion's breeding and constant maintenance. The stallion is in truth as much a product of the soil as a tree or a plant, and its generative capacity is likewise a product of the soil. Indeed, in *Derby* (*Earl*) v. *Aylmer* (1), Rowlatt J. draws the exact parallel between a stallion and a prolific tree, and speaks of "the produce and reproduction of the animal or the tree." On these grounds I think that the service of the stallion is appurtenant to the soil and a profit of the occupation in every case, so that in this regard it is immaterial whether the service is to the appellant's own mares or whether it is sold to strangers; in the latter case the service is sold from the land and as a product of the land, just as much as bullocks, potatoes, fruit or eggs are sold from the land. Without the appellant's stud farm or some other such stud farm the stallions could not live or exercise their generating functions. The value of these functions is inseparably connected with the occupation of land. I understand that reasoning on these lines is the basis of the dissenting judgment of Romer L.J., and I agree with him that Schedule B covers the case and that there cannot be any further assessment under Schedule D.

It is, however, objected that this conclusion is not open to your Lordships because of the decision of this House in *Malcolm* v. *Lockhart*. (2) That would be true if the case contained a direct decision of principle governing the question now before your Lordships. But I do not find in it any such ruling. The Commissioners had found as a fact that the fees were outside Schedule B, but only in regard to fees for serving mares at outside farms away from Malcolm's farm. No claim was being made to assess outside Schedule B in respect of fees for serving mares of other farmers on

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(1) [1915] 3 K. B. 374, 380.

(2) [1919] A. C. 463.

Malcolm's farm. This House held in effect that it was impossible to say there was no evidence for the Commissioners' finding of fact, and though no specific mention is made of the distinction between serving mares at the stallion's home and serving mares at outside farms, the decision must be taken to be based on the special facts which involved that the fees in question were not a profit arising in respect of the occupation of that particular farm. And it may be observed that there may, at least in theory, be cases in which the stallion, kept, say, in a stable or a mews and taken round to visit the mares, could not be regarded as appurtenant to any land. I cannot see any indication that the questions of construction discussed in the present appeal were ever considered, still less decided, in that case. I am further in accord with the observations made on that authority by my noble and learned friend Lord Buckmaster. The case of *McLaughlin* v. *Bailey* (1) cannot, I think, be distinguished in substance from the present case, but for the reasons explained I do not think it was rightly decided, and I think should not be followed. No other authority cited is of direct relevance. It is true that in the *Earl of Derby* v. *Aylmer* (2), service fees such as those in question here were assessed under Schedule D as an assessment additional to the assessment under Schedule B on the stud farm, but it was there not contested that Schedule D applied, and the case was only argued on the question whether the stallion could be regarded as "plant" and entitled as such to an allowance for depreciation. On that limited question Rowlatt J., as above indicated, decided that the stallion was not plant, being analogous to a prolific tree.

The case of *Carlisle and Silloth Golf Club* v. *Smith* (3) was strongly pressed on behalf of the respondent. That case, however, had no bearing on the relevant question here—namely, what is the meaning of occupation under Schedule B? The golf club had been assessed under Schedule D in respect of green fees received from visitors on a finding of fact that they were profits of a trade or business separate from the mutual enjoyment by the members of the golf course. The case was in some ways not dissimilar from that of *Coman* v. *Governors of the Rotunda Hospital, Dublin* (1), which has already been referred to. In neither of these cases did questions arise of assessment under Schedule B, nor was there any question of the natural produce of the occupation of the soil.

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(1) [1920] 2 I. R. 310; 7 Tax Cas. 508.

(2) [1915] 3 K. B. 374.

(3) [1913] 3 K. B. 75.

I think the considerations I have elaborated above are conclusive to decide the case in favour of the appellant.

Order appealed from reversed. Cause remitted to the Commissioners for the Special Purposes of the Income Tax Acts with a Direction to discharge the Assessments. Order that sums in respect of income tax be repaid by the Commissioners of Inland Revenue with interest at the rate of four per cent. The respondent to pay the appellant his costs in the Courts below and also his costs of the appeal to this House.

Lords' Journals, March 14, 1933.

Solicitors for appellant: *Gibson & Weldon, for Rustons & Lloyd, Newmarket.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

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(1) [1921] 1 A. C. 1.

[HOUSE OF LORDS.]

WEMYSS COAL COMPANY, LIMITED . APPELLANTS ; H. L. (Sc.)*

AND

HAIG . . . . RESPONDENT.

1933

June 27.

Workmen's Compensation—Industrial Disease—Date of Disablement—Certificate of Certifying Surgeon—Appeal to Medical Referee—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43.

Where under s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925, the certifying surgeon certifies that a workman is suffering from a scheduled industrial disease and is thereby disabled from earning full wages at the work at which he was employed, the medical referee has under the section power to alter the date specified by the certifying surgeon as the date on which the disablement commenced. The power to review conferred upon the medical referee is not confined to the questions whether the certifying surgeon should or whether he should not give a certificate of disablement under sub-s. 1 (i.), but covers the whole range of the action of the certifying surgeon in giving or refusing to give a certificate under that sub-section.

M'Ginn v. *Udston Coal Co.* 1912 S. C. 668 and *Frost* v. *Clanway Colliery Co.* [1920] 1 K. B. 423 approved; opinion of Lord Hunter in *Lowe* v. *Wilsons and Clyde Coal Co.* 1930 S. C. 32 disapproved.

Interlocutor of the Second Division of the Court of Session 1933 S. C. 53 reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session (1) dated November 18, 1932, reversing the decision of the Sheriff-Substitute of Fife and Kinross at Kirkcaldy.

The respondent was in the employment of the appellants as a repairer. On October 28, 1931, he obtained from the certifying surgeon appointed under the Factory and Workshop Act, 1901, a certificate that he was suffering from dermatitis produced by dust or liquids, a scheduled industrial disease under the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (Statutory Rules and Orders, 1929, No. 2), s. 2, made in pursuance of s. 43, sub-s. 3, of the Workmen's Compensation Act, 1925. The certificate stated further that the respondent was thereby disabled from earning full wages at his work, and that the disablement had commenced on October 20, 1931.

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, LORD MACMILLAN, and LORD WRIGHT.

(1) 1933 S. C. 53.

The employers appealed from this certificate to the medical referee.

The workman had in December, 1928, while in the employers' service, suffered from an attack of dermatitis, and had then obtained from the certifying surgeon a certificate of disability. On that occasion the employers had admitted their liability to pay compensation under the Workmen's Compensation Act and had since paid compensation up to June 13, 1930. The workman then discharged his claim for a lump sum of 100*l.* In 1931 he returned to the service of the employers.

In their appeal to the medical referee in October, 1931, the employers contended, and succeeded in establishing, that the disablement certified by the certifying surgeon as having commenced on October 20, 1931, was not in truth a new disablement, but was a recurrence of the previous disablement of December, 1928, in respect of which the workman had discharged his claim for compensation.

The workman commenced proceedings in the Sheriff Court of Fife and Kinross, claiming compensation for total disablement from dermatitis produced by dust or liquids from October 20, 1931. He relied upon the certificate of the medical referee, in so far as it confirmed the certificate of the certifying surgeon that he was suffering from the industrial disease, but contended that it was void and of no effect in so far as it gave December 10, 1928, as the date when the disease commenced, on the ground that the medical referee had no power under s. 43 of the Workmen's Compensation Act, 1925 (2), to alter the date fixed by the certifying surgeon.

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(1) Workmen's Compensation Act, 1925, s. 43, sub-s. 1: "Where (i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, ... certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed, ... and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, ... he

The employers opposed the application on the ground that it was incompetent.

The Sheriff-Substitute dismissed the claim, subject to a case stated for the opinion of the Second Division of the Court of Session on the following questions of law :—

(1.) Under the provisions of the Workmen's Compensation Act, 1925, and particularly s. 43 thereof, had the medical referee power to alter the date fixed by the certifying surgeon as the date of the commencement of disablement from the disease from which the claimant suffered ?

(2.) In the circumstances was the Sheriff entitled to give effect to the certificate of the medical referee ?

The Second Division (the Lord Justice-Clerk, Lord Hunter, and Lord Anderson ; Lord Murray dissenting) reversed the decision of the Sheriff-Substitute and sustained the appeal of the workman.

The employers appealed to this House.

May 15, 16. *T. M. Cooper K.C.* and *A. G. Erskine Hill* for the appellants.

A. P. Duffes (of the English Bar, and K.C. of the Scottish Bar), *W. Ingram K.C.*, and *F. C. Watt* for the respondent.

The following cases were cited : *M'Ginn* v. *Udston Coal Co.* (1) ; *Birks* v. *Stafford Coal and Iron Co.* (2) ; *Frost* v. *Clanway Colliery Co.* (3) ; *Garrett* v. *Waddell & Son* (4) ;

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or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications . . . . (*f*) If an employer or workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final. . . . ."

Sub-s. 2: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given : Provided that—(*a*) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine."

(1) 1912 S. C. 668.

(2) (1913) 6 B. W. C. C. 617.

(3) [1920] 1 K. B. 423.

(4) 1911 S. C. 1168.

Lowe v. *Wilsons and Clyde Coal Co.* (1); *Wilsons and Clyde Coal Co.* v. *Flynn* (2); *Mason* v. *Foster.* (3)

The House took time for consideration.

June 27. LORD ATKIN. My Lords, this is an appeal by the employers from the decision of the Second Division of the Court of Session in a case stated on proceedings taken under the Workmen's Compensation Act, 1925, in the Sheriff Court of Fife-Kinross. The Sheriff-Substitute dismissed the claim, and on case stated formulated two points of law which were decided in favour of the workman by the Court of Session. The principal question is one of general interest, and is whether in a case where the matter of a certificate by the certifying surgeon of disablement from industrial disease is referred to the medical referee in pursuance of s. 43 of the Act, the medical referee is empowered to vary the decision of the certifying surgeon as to the date upon which the disablement commenced.

My Lords, notwithstanding the respect that I hold for the opinions of the learned judges who formed the majority in the Court of Session, I entertain no doubt after full consideration of the matter that the opinions of the Sheriff-Substitute and of Lord Murray are right and that the question should be answered in the affirmative.

The workman while in the appellants' employment as a mine repairer in 1928 contracted from the nature of his employment dermatitis, and in December of that year obtained from the certifying surgeon a certificate that he was disabled by the disease and that the disablement commenced on December 10, 1928. Liability was admitted and compensation paid up to June 13, 1930, when the compensation was discharged for a lump sum payment of 100*l.* As the sequel shows this appears to have been an unfortunate bargain for the workman, but a memorandum of agreement was duly registered and the discharge has been treated as effective by the Sheriff-Substitute in this proceeding.

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(1) 1930 S. C. 32.

(2) [1930] A. C. 516.

(3) [1931] 2 K. B. 172, 183.

In 1931 the workman was again employed by the appellants, apparently above ground. In October he was put to work underground and again suffered from the disease, and on October 28, 1931, obtained from the certifying surgeon a certificate that he was disabled by dermatitis as an industrial disease and that the disablement commenced on October 20, 1931. The employers alleging that they were aggrieved by this certificate, especially by the date fixed for disablement, obtained an order referring the matter to the medical referee. On December 21, 1931, the medical referee decided that the workman at the time of his examination by the certifying surgeon was suffering from dermatitis and was thereby disabled, but fixed December 10, 1928, as the date of disablement. He thus accepted the contention of the employers that there was no new disablement, and that the workman was suffering from the effects of the old " accident " of December, 1928, with the result that the workman's claim has been held to be barred by the settlement in discharge.

The argument for the respondent was that when the relevant sections are looked at it will be found that the provisions for the essential certificate by the certifying surgeon are made by s. 43. So far as sub-s. 1 goes the only matters to be certified are whether the workman is suffering from a scheduled disease, and whether he is thereby disabled. It is provided that the disablement is to be treated as the happening of the accident. Provision is made for an appeal by sub-s. 1 (*f*): " If an employer or workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final." So far the section has said nothing about the mode of fixing the date of disablement: and the contention appears to be that the " matter " which can be referred to the medical referee under (*f*) comprises only those topics which have already been made the subject matter of the certificate by the preceding words of the sub-section—namely, suffering from the disease, and consequent disablement; it is only the question whether the certifying surgeon was right or wrong in saying that the workman was disabled by the scheduled disease that is intended to come under review by the medical referee. If so disabled the question of the date of disablement is dealt with by a separate sub-s. 2: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: provided that (*a*) where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine." We were invited to notice that in this sub-section the date of disablement is to be the date fixed by the certifying surgeon: and that the express power in the proviso given to the medical referee to fix the date negatives any similar power in other circumstances —expressio unius exclusio alterius. It is convenient here to refer to a further matter which the certifying surgeon may state in his certificate—namely, the power under s. 44, sub-s. 1, to express an opinion that the disease is not due to the nature of the employment. It is similarly argued that this matter also is not one upon which the medical referee can overrule the certifying surgeon.

My Lords, I venture to think that this argument can only be accepted by giving too much weight to the chronological or geographical position of the relative parts of the Act of Parliament. When looked at as a whole the scheme of compensation for industrial disease seems reasonably plain. Disablement by industrial disease is to be treated as an accident within the Act: the date of disablement is to be the date of the accident. The question of date is of especial importance, for not only does it affect the quantum of compensation but it also affects the liability of either the last employer or of preceding employers within twelve months from that date. The questions whether a man is suffering from an industrial disease and is disabled thereby are recognized as medical questions. For obvious administrative reasons they are not to be litigated between the parties; these issues are to be finally determined by the certifying surgeon or on appeal by the medical referee. And it is to be noticed that it is only before the medical referee that the contentions of both parties can be heard; the decision of the certifying surgeon is necessarily ex parte.

But another essential issue is the date of disablement. This again is recognized as a medical question, and is to be decided finally by a medical authority. But it is suggested that this vital question is to be determined by the certifying surgeon alone ex parte and is not one upon which the parties may raise opposing contentions before the medical referee. What reason there could be for such a remarkable enactment is not suggested. Nor do I understand how the appeal provisions can be worked in practice with such a restriction upon the investigation by the medical referee. On the simple issues whether at the time of the examination by the certifying surgeon the workman was suffering from a scheduled disease and was disabled thereby, a necessary line of inquiry must be in many cases, what are the symptoms, when did they begin, when was the alleged disability first experienced. The certifying surgeon may have imputed an original disability to earn wages to industrial disease, though it is plain to the referee that the industrial disease supervened later and that the first disability was due to ordinary illness. Or, reversely, the surgeon may have been unable to detect industrial disease in the first disability, though the referee finds the disability throughout to have been from industrial disease. I find it difficult to imagine a self-respecting medical referee who would be content to affirm a decision of a certifying surgeon, correct as to the existence of an industrial disease and disablement at the time of his examination, but obviously incorrect as to his diagnosis for possibly six or nine months, and therefore incorrect as to the onset of the disease and the disability arising from it. I have little doubt that in practice no referee has observed this restriction and this is made reasonably plain by the forms provided for the referee's use both before and after the recent revision. I entertain no doubt that the practice is in accordance with the law. The essential elements of the certificate are defined by the Act: suffering from scheduled disease and disability by s. 43, sub-s. 1, date of disablement by s. 43, sub-s. 2: if "the action" of the certifying surgeon in including in his certificate what appear to be erroneous decisions on these points "aggrieve" either party, then on an order referring "the matter" to the medical referee the latter's duty is to form his own opinion upon the matter objected to and his opinion will be conclusive. Speaking for myself I have little doubt that the expression of opinion mentioned in s. 44, sub-s. 1, as to the disease not being the result of the employment, is equally a matter for the medical referee if the certifying surgeon has expressed such an opinion. The decision in *M'Ginn* v. *Udston Coal Co.* (1), at least goes as far as this; and, I think, to this extent at least should be followed. I can find no support for the respondent in the fact that the provision as to fixing the date is found in sub-s. 2, not in sub-s. 1. Wherever it is to be found, it in fact provides part of the content of the certificate; and it is the certificate as a whole which is subject to appeal. When powers are granted by the Legislature to an investigating authority, subject to an appeal, they are usually granted in terms to the authority in first instance, and not to the appeal authority. The latter's powers are neither greater nor less because original powers are not expressly given to him; they depend upon the scope of his appellate jurisdiction and remedial powers.

Equally without importance appears the circumstance that the proviso to sub-s. 2 expressly gives the referee power to fix the date of disablement where the certifying surgeon refuses a certificate of disablement. In such a case the surgeon has not considered the date; the referee is applying his mind to it as in original jurisdiction, and it seems natural enough that the Act should provide that the date must be fixed by one or other of the two medical authorities, and if not by the doctor of first instance then by the doctor on appeal.

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(1) 1912 S. C. 668.

My Lords, I have come to this conclusion after having had the assistance of the decisions below and of the elaborate and careful argument of counsel for the respondent. I derive satisfaction from finding that after the fuller discussion in this case I am still able to affirm the conclusion which Lord Warrington and I expressed in 1920 in *Frost's* case. (1) The result is to give an appeal to employer and workmen alike on a medical matter, which concerns them both, in respect of which there appears no reason for dissociating the question of disablement from the question when the disablement began. For these reasons I think that the first question should be answered in the affirmative.

It was suggested to us on the second question that as the workman resumed work at full wages, though apparently above ground, in 1931, the medical referee's decision was so much at variance with the proved facts that the arbitrator was entitled to ignore it. I do not see how it would be possible to accept this view consistently with the statutory provision that the medical referee's decision is to be final. For these reasons I am of opinion that the interlocutor of November 18, 1932, should be reversed, and the questions of law stated in the case should both be answered in the affirmative. The appellants should have the costs here and below.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session, pronounced upon the hearing of a case stated by the Sheriff-Substitute as arbitrator under the Workmen's Compensation Act, 1925, whereby their Lordships by a majority (the Lord Justice-Clerk, Lord Hunter and Lord Anderson; Lord Murray dissenting) answered in the negative the two questions of law stated in the case and reversed the determination of the Sheriff-Substitute by which he had dismissed the respondent's claim to compensation.

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(1) [1920] 1 K. B. 423.

The questions stated were :—

(1.) Under the provisions of the Workmen's Compensation Act, 1925, and particularly s. 43 thereof, had the medical referee power to alter the date fixed by the certifying surgeon as the date of the commencement of disablement from the disease from which the claimant suffered ?

(2.) In the circumstances was I entitled to give effect to the certificate of the medical referee ?

The first question raises the real point in this appeal. The answer to the second is merely consequential to that given to the first. This question, which is merely one of construction of s. 43, is of great importance in the administration of that part of the Act which deals with disablement by industrial diseases. It has never so far come up for determination by your Lordships' House, but it has been the subject of conflicting opinions expressed by members of the Court of Session in Scotland and of the Court of Appeal in England respectively, and therefore requires the most careful consideration by your Lordships.

It is unnecessary to restate the admitted facts ; it is enough to say that if the date fixed by the medical referee is to prevail over that fixed by the certifying surgeon the result is to displace the respondent's claim to compensation.

The scheme under which the application of the Act to industrial diseases is to be carried out is contained in s. 43.

The material provisions of s. 43 relating to disablement are as follows :—

Sub-s. 1 : " Where (i.) the certifying surgeon . . . . certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed, ... and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . ., whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease . . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications :—

"(*a*) The disablement . . . . shall be treated as the happening of the accident." . . . .

"(*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due."

There then follow certain provisions enabling the employer mentioned in (*c*) to obtain by appropriate proceedings either the substitution of another employer for himself or contribution from other employers.

(*d*) and (*e*) throw no light on the question of construction.

"(*f*) If an employer or a workman is aggrieved by the action of a certifying . . . . surgeon in giving or refusing to give a certificate of disablement . . . . for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive."

"(2.) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given."

"Provided that—

"(*a*) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine."

The short question for determination is whether or not on the true construction of the Act the fixing by the certifying surgeon of the date of disablement either expressly, by writing it in the certificate, or impliedly, by determining that he is unable to do so, and thus leaving sub-s. 2 to fix the date as that on which the certificate is given, is part of the matter referred to the medical referee.

In the first place it is to be noticed that the date of disablement is one of the utmost importance as being that of the happening of the accident. In this role it regulates a number of matters on which after the happening of an accident the rights and duties of both employer and workman may depend. Moreover, in relation to industrial diseases, it is the date by reference to which the employment to the nature of which the disease is due and the employer from whom compensation is to be recoverable are respectively to be ascertained.

The " matter " to be referred to the medical referee is the grievance suffered by either employer or workman by " the action of the certifying surgeon in giving or refusing to give a certificate of disablement." " Action " in my opinion in this context connotes everything that the certifying surgeon does in giving or refusing his certificate, and cannot be confined to the mere fact of giving or refusing to give. One of the things he does in giving his certificate is either to insert the date of disablement or to issue it in blank. In either case his action results in fixing that date and may be one of the things by which either employer or workman may be aggrieved. In the reference " the matter " is, I think, the determination of the question whether or not the appellant is justly aggrieved, and the source of grievance should therefore be removed by the appellate tribunal, in this case the medical referee.

I see no difficulty in the fact that the Act provides that the date of disablement is to be ascertained by the action of the certifying surgeon. The medical referee is in the position of an appellate tribunal empowered to reconsider the surgeon's conclusions, and if it was intended that one of his conclusions was not to be subject to appeal, that fact would have been found expressly mentioned.

There remains only one matter to be referred to, I mean the proviso (*a*) to sub-s. 2. This, it has been argued, gives in one event to the medical referee the power to determine the date of disablement; the power to review should therefore be regarded as confined to that event. The obvious answer is that in the case of a refusal by the certifying surgeon he has not either expressly or impliedly dealt with the date, for he has simply found that there was no disablement at all, and a mere reversal of that refusal would not cure the defect and the power in question was therefore given to the medical referee. The giving him of this particular power does not in the least hinder him from dealing with the whole matter in which the appeal arises in cases where the recourse to it is unnecessary.

I am of opinion therefore that the appeal should be allowed and the interlocutor appealed from reversed and the question No. 1 in the case answered in the affirmative. That the same answer should be given to question No. 2 follows as a matter of course.

It also follows that the opinion expressed by Lord Hunter in *Lowe's* case (1), and approved by some other learned judges of the Court of Session, must be taken to be overruled. I need not say that I entertain the greatest respect for the opinions of these learned judges, but after the most careful consideration I have arrived at a contrary opinion in this case and am bound to act upon it.

As to the other authorities referred to, I can only say that in my opinion the view I have expressed is either confirmed by them (as in *Frost* v. *Clanway Colliery Co.* (2)) or is not in conflict with anything to be found in them.

As to the point raised by para. 14 of the respondent's case (3), I can find no ground for sending back the matter to the medical referee. There is no ambiguity or difficulty of interpretation in his certificate, and therefore nothing on which further information from him could properly be asked for.

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(1) 1930 S. C. 32.

(2) [1920] 1 K. B. 423.

(3) This was a suggestion that the medical referee must have failed to distinguish between the existence of the disease and the disablement caused by it; the ground of the suggestion was that the certificate seemed to the respondent to affirm, contrary to the facts, that the disablement had continued without intermission from December 10, 1928, to December 21, 1931.

The regulations and forms issued by the Secretary of State were referred to, but I cannot find that they throw any light on the construction of the statute even if they were admissible for that purpose, as I think they are not.

I think the respondent should be ordered to pay the costs here and below.

LORD THANKERTON. My Lords, the question at issue in this appeal is whether a medical referee, on a reference to him under s. 43, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1925, on the application of the employers, is entitled to review the date certified by the certifying surgeon under sub-s. 2 of the section as the date on which the disablement commenced.

The decision of this question depends on the proper construction of para. (*f*) of s. 43, sub-s. 1, from which the medical referee derives his authority. In the first place, I have no doubt that the words "for the purposes of this section" qualify the words "giving or refusing to give a certificate of disablement," and, so far as material to the present case, the paragraph reads: "If an employer or a workman is aggrieved by the action of a certifying . . . . surgeon in giving or refusing to give a certificate of disablement . . . . for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final." . . . .

In my opinion, the regulations to be made by the Secretary of State relate to procedure, and cannot alter or control the "matter" to be referred. The determination of what the "matter" is must depend on the construction of the statute, which falls to be determined by the Court. Accordingly, it is unnecessary to refer to the regulations.

What is "a certificate of disablement for the purpose of this section"? It seems clear that a certifying surgeon has a duty to consider four things—namely: (*a*) whether the workman is suffering from a scheduled disease; (*b*) whether he is thereby disabled from earning full wages at the work at which he was employed; (*c*) the date on which the disablement commenced; and (*d*) whether the disease was not due to the nature of the employment, i.e., the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of disablement. In giving a certificate the surgeon must answer (*a*) and (*b*) affirmatively; if he is able to fix a date, he must certify as to (*c*); if he has formed an opinion hostile to the workman on (*d*), it is his duty to so certify, though such an opinion only shifts the burden of proof on to the workman. Counsel for the respondent conceded—in my opinion, rightly—that the Act only contemplated one certificate for all these matters, which would be correctly described as a certificate of disablement. The certificate, so far as it deals with (*a*), (*b*) and (*c*), which are provided for in s. 43, is obviously for the purposes of that section; in my opinion, though provided for in s. 44, sub-s. 1, the surgeon certifies as to (*d*) also for the purposes of s. 43, which confers the right to compensation in the case of industrial diseases. It follows that (*a*), (*b*), (*c*) and (*d*) are all included in the certificate of disablement for the purposes of s. 43 referred to in para. (*f*) of s. 43, sub-s. 1.

The only room for argument left to the respondent is on construction of the words " the action of a certifying surgeon in giving or refusing to give " such a certificate, and he maintains that these words limit the matter referred to a question of " yea " or " nay " to the certificate as a single whole, and further that the employer's grievance is limited to a grievance against the giving of a certificate, and the workman's grievance is correspondingly limited to a grievance against the refusal of a certificate. In my opinion, the words used do not naturally bear either of these meanings, which would have been easily expressed in simple language, if Parliament had so intended, and the words " aggrieved by the action of a certifying surgeon in giving or refusing to give " appear to me to be designed to cover a ground of objection to any part of the surgeon's action in giving or refusing to give the certificate.

If this view be correct, it would have been bad draftsmanship to insert in sub-s. 2 of s. 43, after the words " certifying surgeon," such words as " or the medical referee on appeal," as is suggested by some learned judges in the Court below. Proviso (*a*) in this sub-section really confers an original jurisdiction on the medical referee, where no date has been fixed on account of the surgeon's refusal of a certificate.

I find it unnecessary to add to your Lordships' comments on the various cases cited in argument, except to say that in my opinion the cases of *Birks* v. *Stafford Coal and Iron Co.* (1) and *M'Ginn* v. *Udston Coal Co.* (2) were rightly decided, though the reasons given for the decision in the former case are not satisfactory. I would further add that I agree with the views expressed by my noble and learned friends Lord Atkin and Lord Warrington in *Frost* v. *Clanway Colliery Co.* (3)

While I have carefully considered the opinion of Lord Hunter in the case of *Lowe* (4), and the opinions of the learned judges who agreed with him in the present case, I have formed my opinion without hesitation or doubt. I am not sorry to think that it will enable a decision inter partes to be obtained from the medical referee, if the ex parte decision of the certifying surgeon is not acceptable ; I agree with the observations of the noble Lord on the Woolsack on this point. I also agree that there is no ground for sending this case back, as suggested by the respondent.

I therefore concur in the motion proposed.

LORD MACMILLAN. I find myself entirely in agreement with the views expressed by my noble and learned friends who have preceded me, as also with the view about to be expressed by my noble and learned friend Lord Wright, which I have had the advantage of considering in print. In these circumstances I content myself by expressing my concurrence with the motion about to be put from the Woolsack.

LORD WRIGHT. My Lords, I am so fully in agreement with the opinions in this case of the noble and learned Lords who have preceded me that I need do no more than express in the most summary form the reasons on which I have

(1) 6 B. W. C. C. 617.
(2) 1912 S. C. 668.
(3) [1920] 1 K. B. 423.
(4) 1930 S. C. 32.

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Lord Wright.

arrived at the same conclusion. In essence the crucial question is the true construction of the words giving the appeal under s. 43, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1925, to the medical referee from the certifying surgeon. The words on which the decision turns are: "If an employer or a workman is aggrieved by the action of a certifying . . . . surgeon in giving or refusing to give a certificate of disablement . . . . for the purposes of this section, the matter shall . . . . be referred to a medical referee, whose decision shall be final." In my opinion the right of appeal so given is unqualified, and the matter to be referred is anything which can come within the scope of "the action of the certifying surgeon in giving or refusing to give" the certificate: the party aggrieved as to the giving may be either the employer or the workman (because I see no reason to read the words distributively), and one important respect in which the workman equally with the employer may be aggrieved by the certificate given is as to the date of disablement. That date is as essential a part of the certificate as either the fact that the man is suffering from the disease or the fact that he is disabled thereby. It is only possible to exclude that date from the surgeon's action in certifying if "action" in giving a certificate is construed as limited to the mere giving, abstracted from the contents of the certificate given. But I think no such abstraction is possible, and hence that the right of appeal extends to the case where, though it is not complained that no certificate should have been given, the correctness of the date stated in the certificate as the date of disablement is called in question by the employer or the workman. If the right of appeal so given is to be construed as cut down by considerations drawn from something else in the Act, it must be so cut down in clear terms. I cannot find that this is so. It is true that sub-s. 2 comes after and not before sub-s. 1 (*f*), but both provisions are expressed to be "for purposes of the section," and the placing of sub-s. 2 where it is appears to me to be merely for convenience in drafting; logically it should be read as coming in the same place as, and should be construed

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along with, the words "the date of disablement" in sub-s. 1.

Nor can I draw any inference favourable to the respondent from the provision of sub-s. 2 that the date is to be certified by the certifying surgeon; the object of that provision is to place that matter as a medical question outside the scope of the arbitrator's jurisdiction. The sub-section cannot fairly be construed as cutting down the appeal to the medical referee; indeed, by placing the question as one to be included in the certificate, it involves that the appeal covers that as a matter included in the certificate.

Nor does the proviso (*a*) to sub-s. 2 affect the matter; that proviso simply gives to the medical referee an original jurisdiction to fix the date of disablement when the certifying surgeon has not certified at all; but it has nothing to say to the different case and the right of appeal in that case—I mean the case where the surgeon has certified, but it is complained that he has in some respect, such as date of disablement, wrongly certified.

It follows that I agree also with the statement of the law on the point in question contained in the opinions of Lord Atkin and Lord Warrington in *Frost's* case. (1)

In my judgment the appeal should be allowed.

Interlocutor appealed from reversed. Cause remitted to the Court of Session with a direction to answer both the questions of law in the stated case in the affirmative, and to restore the determination of the Sheriff-Substitute. The respondent to pay the appellants the costs of the action in the Court of Session and of the appeal to this House.

Lords' Journals, June 27, 1933.

Agents for appellants: *Beveridge & Co., for Wallace, Begg & Co., W.S., Edinburgh, and J. M. Davidson, Glasgow.*

Agents for respondent: *H. S. L. Polak & Co., for W. Steele Nicoll, S.S.C., Edinburgh, and W. Philp, Kirkcaldy.*

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(1) [1920] 1 K. B. 423.

[HOUSE OF LORDS.]

BULMER RAYON COMPANY, LIMITED APPELLANTS; H. L. (E.)*

AND 1933

FRESHWATER AND ANOTHER . . . RESPONDENTS. June 30.

Merger—Release—Pollution of River by Company—Goodwill, Business and Liabilities transferred to Purchasers—Action against Purchasers—Assessment of Damages—Inclusion of Damages for Acts of Company—Judgment unsatisfied—Action against Company—Company and Purchasers not joint Tortfeasors.

In 1931, the owners and occupiers of a farm on the banks of a river brought an action against a limited company (hereinafter called the selling company), manufacturers of artificial silk, for polluting the stream and causing damage and injury to the farm and to their business as farmers from 1925 to May, 1928.

The selling company in their defence pleaded that in March, 1928, they sold the goodwill of their business and all their property to a purchasing company as from February 1, 1928, and that it was agreed between them and the purchasing company that the latter should satisfy and discharge all liabilities and obligations of the selling company and indemnify them against all actions and claims in respect thereof; that in September, 1928, the same plaintiffs had brought an action against the purchasing company in respect of the same damage and injury from May, 1928, and that it was then agreed between the plaintiffs and the purchasing company that, for the purpose of calculating the amount of damages suffered by the plaintiffs, the damages caused by the selling company should be added to those caused by the purchasing company; that in October, 1929, the plaintiffs recovered judgment whereby an inquiry was directed what damages the plaintiffs had sustained through the pollution of the river by the purchasing company or their predecessors in title, the selling company; that these damages were assessed at 2650*l.*, and that the judgment remained in force.

Subsequently an order was made for the compulsory winding-up of the purchasing company and the judgment was wholly unsatisfied.

Held, that the facts pleaded in the defence afforded no answer to the action against the selling company, inasmuch as they suggested neither a release of the selling company from the causes of action complained of, nor *semble* an accord and satisfaction thereof or any merger of them in the judgment.

Order of the Court of Appeal [1933] Ch. 162 affirmed.

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* *Present:* VISCOUNT BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.)
1933
BULMER RAYON CO. v. FRESHWATER.

APPEAL from an order of the Court of Appeal (1) affirming an order of Luxmoore J. in favour of the plaintiffs in an action by William Frederick Freshwater and Eva Violet Freshwater, his wife, against the Bulmer Rayon Company, Ld., the appellants in this appeal.

The plaintiff William Frederick Freshwater was the occupier of a farm and mill called Badley Mill in the county of Suffolk. The plaintiff Eva Violet Mary Freshwater, his wife, was the owner of the farm and mill. The River Gipping, a natural stream, flows through the farm, and the mill is situate on the river.

The defendant company from 1925 to May, 1928, owned and occupied a factory and artificial silk works on the banks of the River Gipping above the plaintiffs' premises. In October, 1925, they began manufacturing artificial silk, and the plaintiffs alleged that from that date until May, 1928, they had polluted the river by discharging into it large quantities of poisonous chemicals.

On July 4, 1931, the plaintiffs brought the action in the Chancery Division for nuisance. In their statement of claim they complained of serious injury to their business, and they claimed damages and further or other relief.

The defence contained the following paragraphs :—

" 6. In the alternative the defendants say—

" (A) That by an agreement dated March 28, 1928, and made between the defendants of the one part and the British Acetate Silk Corporation, Limited (hereinafter called 'the Corporation'), of the other part the Corporation which was established for the purpose of entering into such agreements amongst other objects agreed to purchase the goodwill of the business of the defendants and all their property whatsoever and wheresoever (except certain assets specifically excepted). As part of the consideration for the said sale the Corporation agreed to pay, satisfy and discharge and fulfil all the debts liabilities contracts engagements and obligations of the defendants whatsoever in relation to the said business and at all times to indemnify the defendants against all actions

(1) [1933] Ch. 162.

proceedings claims costs and demands in respect of such debts liabilities contracts engagements and obligations so to be paid satisfied and discharged by the Corporation. By clause 11 of the said agreement it was provided that possession of the property thereby agreed to be sold should be retained by the defendants until the completion of the said purchase and that in the meantime the defendants should carry on the said business in the same manner as theretofore so as to maintain the same as a going concern and should from February 1, 1928, inclusive, be deemed to have been and to be carrying on such business on behalf of the Corporation and should account to and be indemnified by the Corporation accordingly.

"(B) That in an action the title and short reference to the record whereof is 1928—F. No. 1433, *Freshwater* v. *The British Acetate Silk Corporation, Ld.* (1), the plaintiffs sued the Corporation for the same cause of action (2) as in the statement of claim alleged.

"(C) That by letter dated October 12, 1928, and written by the plaintiffs' solicitors to Messrs. Herbert Smith & Co., the solicitors of the Corporation, the plaintiffs enquired whether the Corporation was prepared to accept responsibility in the said action for whatever damage might be held to have been caused to the plaintiffs by the defendants and stated that if the Corporation was so prepared there would be no necessity for any separate action against the defendants but that if the Corporation was not so prepared it would be necessary to proceed against the defendants in the said action or alternatively in a separate action. By a letter dated October 25, 1928, written by the said Messrs. Herbert Smith & Co. to the plaintiffs' solicitors the Corporation agreed that for the purpose of calculating the amount of damage (if any) alleged to have been suffered by the plaintiffs, the amount of such damages in so far as the same were shown to have been suffered at the hands of the defendants could be added to those claimed against the Corporation.

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(1) The writ in this action was issued on September 27, 1928.

(2) This was not strictly accurate. The plaintiffs sued for similar causes of action accruing on and after February 1, 1928.

"(D) That on October 17, 1929, the plaintiffs recovered judgment in the said action under an order in which it was (inter alia) ordered that an enquiry should be made as to what damage had been occasioned to the plaintiffs or their property by reason of the pollution by the Corporation or their predecessors in title, the defendants, of the waters of the said River Gipping or its tributary streams and that the Corporation should pay to the plaintiffs the amount which should be certified.

"(E) That the said enquiry was duly made and the said damage was subsequently certified as 2650*l.*, and

"(F) That the said judgment still remains in force.

"7. If which is denied the defendants were ever liable to the plaintiffs or either of them in respect of the said cause of action the defendants will submit that by or by reason of the acts and events alleged in paragraph 6 hereof the plaintiffs accepted or must be deemed to have accepted the liability of the Corporation for the acts of the defendants alleged in the statement of claim herein in substitution for and in discharge of the liability of the defendants for such acts and that the plaintiffs are thereby precluded or estopped from suing the defendants in respect thereof or (in the alternative) that the cause of action in respect of the said acts alleged in this action is the same as the cause of action in respect of the acts of the defendants alleged in the said action and (*sic*) in respect of which the plaintiffs recovered judgment in the said action and that the said cause of action was and is merged in the said judgment or (in the alternative) that the said cause of action in respect of all the alleged acts of the defendants which were committed on and after February 1, 1928, was and is merged in the said judgment."

The defendants admitting the facts alleged in the statement of claim, and the plaintiffs admitting the facts alleged in paragraph 6 of the defence, an order was made in Chambers, with the consent of the defendants, that the points of law raised in paragraphs 6 and 7 of the defence as above set out should be set down in the non-witness list and argued before the Court.

It was not disputed that the British Acetate Silk Corporation had been wound up compulsorily and that the judgment of October 17, 1929, was wholly unsatisfied.

The case was heard by Luxmoore J., who held that the matters pleaded in paragraphs 6 and 7 of the defence afforded no defence in law to the plaintiffs' claim.

The defendants appealed to the Court of Appeal. That Court (Lord Hanworth M.R. and Lawrence and Romer L.JJ.) affirmed the decision of Luxmoore J. and dismissed the appeal. (1)

The defendants appealed to this House.

A. F. Topham K.C. and *A. C. Edgar* for the appellants.

Macaskie K.C. and *J. B. Herbert* for the respondents were not called on.

At the conclusion of the argument for the appellants, counsel for the respondents being present but not called on, the House gave judgment as follows :—

VISCOUNT BUCKMASTER. My Lords, this appeal arises out of unusual circumstances. The respondents own a mill and some farm premises between Stowmarket and Needham Market, and through the mill there flows a river called the River Gipping. The appellant company, known as the Bulmer Rayon Company, Ld., had works higher up the stream, and it is alleged that over a certain period of time before March, 1928, they had so polluted the water and the air as to cause serious damage to the respondents. For the purpose of this appeal the allegations as to damage must be accepted, though of course that acceptance does not prevent their being disputed at a later period, but, as alleged, they are of a very grave and serious character and, if the Bulmer Rayon Company are responsible, they are no doubt liable for a large sum of money.

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(1) [1933] Ch. 162.

Now it appears that another company, called the British Acetate Silk Corporation, Ld., which I will refer to as the purchasing company, bought that part of the business of the Bulmer Rayon Company situated above the respondents' mill, in March of 1928, and, as part of the contract for that purchase, it was arranged that the purchasing company should discharge and satisfy all debts, liabilities and obligations of the Bulmer Rayon Company. In addition it was provided that the Bulmer Rayon Company should carry on the business as from February 1, 1928, for and on behalf of the purchasing company. In September of 1928 the respondents took proceedings against the purchasing company in respect of the damage they had suffered by reason of this pollution. The purchasing company had been incorporated on March 13, 1928, and it is perfectly plain that under no circumstances whatever could they possibly be liable in tort for the damages that had been occasioned to the respondents before that date; but the statement of claim followed on a correspondence which took place between the solicitors for the respondents and the solicitors for the purchasing company, in which the former asked if the purchasing company was willing to accept responsibility in the proceedings then instituted for whatever damage might be held to have been caused to the plaintiffs by the Bulmer Rayon Company, the vendor company, adding that if they were not prepared to accept such liability it would be necessary to add the Bulmer Rayon Company as defendants. The answer to that was that the solicitors for the purchasing company were "prepared to agree that, in so far as such damage is shown to have been suffered at the hands of the Bulmer Rayon Company, Ld., the amount of these damages can be added to those claimed against our clients." Upon that the statement of claim was based; it sets out the acquisition of the business upon the terms I have stated, and concludes by saying that the plaintiffs have suffered loss and damage and asking for relief in that respect.

The statement of claim is a remarkable document, for it nowhere separates the claim for damages in respect of tort from the claim for whatever rights the plaintiffs might be assumed to possess by virtue of the arrangement as to indemnity; but there can be no doubt whatever that in substance the claim was based on this—a claim in tort against the purchasing company for the pollution for which they had been responsible as from the time when their responsibility arose, and a claim to be indemnified against whatever claim the plaintiffs might have against the selling company for those damages that arose before the purchasing company took over the business. Upon that claim judgment was given for the plaintiffs by consent, and, as the result, an inquiry was held as to damages and a sum of 2650*l.* damages was assessed. The purchasing company seems to have fallen on evil days, and no part of that sum has been satisfied, nor apparently is it likely that it ever will be. Accordingly, the respondents on July 4, 1931, commenced proceedings against the Bulmer Rayon Company, claiming damages for injuries which had in fact been suffered by them up to the time when the purchasing company took the business over.

To the claim which the plaintiffs based on these allegations the appellants set up the answer that the agreement to pay and satisfy the liabilities made by the purchasing company, the defendants in the former action, which had resulted in the judgment for 2650*l.*, effected a complete discharge, and that the judgment for 2650*l.* was and could only be supported upon the ground that it was a judgment for the tortious acts which are the basis of the present proceedings, so that, whether it was rightly or wrongly obtained, it was in fact a judgment for the same cause of action as that which is now being pursued, and is therefore a satisfaction of the claim.

My Lords, in my opinion the answer to that is perfectly plain. It was not and never could have been a judgment in respect of this cause of action, because this cause of action is based upon torts committed up to and before the time when the defendants in the former action were incorporated, and by no possibility could it have been made the cause of action against them. So far as it is alleged that the same effect is produced by virtue of the agreement to indemnify and the letters, which I have read, the answer is that there is nothing put forward in any of the proceedings to show that there has at any time been a release of the appellants by the respondents from any liability they may be under by virtue of their tortious acts; but unless it can be shown that there has been such a release there is no reason why this action should not proceed. I have pointed out why it is impossible to rely upon the former judgment for the purpose the appellants seek, and it is plain no release is made out nor any release in terms pleaded. It is my opinion, therefore, that this appeal ought to be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

LORD TOMLIN. My Lords, I also agree.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, I agree.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 30, 1933.

Solicitors for appellants: *Clarke & Co.*

Solicitors for respondents: *Morris, Ward-Jones, Kennett & Co.*

[PRIVY COUNCIL.]

BROOKER . . . . APPELLANT;

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AND

THOMAS BORTHWICK AND SONS (AUSTRALASIA), LIMITED . . . } RESPONDENTS.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE COURT OF APPEAL, NEW ZEALAND.

New Zealand—Workers' Compensation—Earthquake—Fall of Debris—Accident arising out of Employment—Workers' Compensation Act, 1922 (*No.* 39 *of* 1922, *N. Z.*), *s.* 3, *sub-s.* 1.

Buildings at Nelson, New Zealand, having collapsed owing to a severe earthquake, debris therefrom fell upon three men who were "workers" within the provisions of the Workers' Compensation Act, 1922, two of them being at work on the premises where they were employed, and the third being in the public street in the performance of his duty as an hotel porter; a further worker while working lost his balance owing to the earthquake and fell down a steep incline on the premises where he was employed:—

Held, that in each case the accident to the worker was one "arising .... out of the employment" within the meaning of s. 3, sub-s. 1, of the Act above mentioned without it being shown that by reason of his employment he was especially exposed to risks incidental to earthquakes.

Thom or Simpson v. *Sinclair* [1917] A. C. 127 applied.

Judgment of the Court of Appeal, New Zealand [1932] N. Z. L. R. 225 reversed.

CONSOLIDATED APPEALS (No. 27 of 1933) from judgments of the Court of Appeal of New Zealand, delivered on December 18, 1931, on four originating summonses removed into the Court of Appeal for determination.

The appeals related to four claims to compensation under the Workers' Compensation Act, 1922, of New Zealand, in respect of injuries (which in two cases were fatal) to "workers" as defined by that Act occurring during the severe earthquake in the Hawke's Bay District of New Zealand on February 3, 1931.

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

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The facts, which were agreed between the parties, are sufficiently stated in the judgment of the Judicial Committee. It was not disputed that in each case the injury was "by accident arising . . . . in the course of the employment" within s. 3, sub-s. 1, of the Act above mentioned; the sole question in each case was whether the accident was also one arising "out of" the employment within the meaning of that provision.

The Court of Appeal, in answer to questions in the originating summons, held that in each case the accident occurred in the course of the employment but did not arise out of the employment of the person injured. The learned judges were of opinion that the accidents severally could not be held to arise out of the employment unless it were shown that the nature or locality of the work exposed the worker to greater risks from earthquakes than those to which the inhabitants were exposed generally. Ostler J., dissenting to that extent from the other members of the Court (Myers C.J., Adams, Ostler and Smith JJ.), was of opinion that upon the facts stated the appellant Prendergast was entitled to compensation. The judgments in the Court of Appeal are reported at [1932] N. Z. L. R. 225.

1933. July 7, 10, 11, 13. *Sir Stafford Cripps K.C.* and *G. G. Slack* for the appellants.

W. A. Greene K.C., *Duckworth* and *H. P. Richmond* for the respondents.

The arguments appear from the judgment. In addition to cases there mentioned reference was made to *Bird* v. *Keep* (1); *Cooper* v. *North Eastern Ry. Co.* (2); and *Palmer Shipbuilding and Iron Co.* v. *Snaith.* (3)

July 28. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from judgments of the Court of Appeal of New Zealand in four proceedings which were brought to determine the liability of employers in respect

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(1) [1918] 2 K. B. 692.

(2) (1915) 9 B. W. C. C. 129.

(3) House of Lords, January 30, 1917; unreported.

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of injuries to their workmen that occurred on the occasion of the serious earthquake in the Hawke's Bay District of New Zealand on February 3, 1931. By the provisions of the Workers' Compensation Act exclusive jurisdiction is given to the Court of Arbitration to decide without appeal claims under the Act. But by a convenient procedure it is possible in New Zealand on agreed facts to obtain the decision of the Supreme Court on a question of law, the judgment being subject to the ordinary rights of appeal. In the present case proceedings having been commenced by originating summons were moved directly by order of the Supreme Court to the Court of Appeal, from whose decision appeal is now brought to this Board.

The provisions of the New Zealand Act, so far as liability is concerned, are identical with those of the English Act. The question is whether the workmen concerned suffered "injury by accident arising out of and in the course of their employment." The parties agreed upon a statement of general facts and also of the particular facts applicable to each case. It is only necessary here to state that the earthquake was exceptionally severe, of intensity 10 on the Rossi Forel scale. In the last ninety years there had only been ten recorded earthquakes of this class in New Zealand. The district was a recognized earthquake zone. Its area was 3567 acres and its population 57,000. It included the borough of Napier with a population of 19,000 and the borough of Hastings with a population of 15,500. Approximately 250 people were killed and at least five times that number injured. The great majority were killed by the collapse of brick buildings or brick chimneys. In each borough there is an area, generally the business area, usually described as the brick area, in which the law requires the buildings to be constructed of brick or other more or less indestructible material. Whether the buildings with which these cases are concerned were within such area is not stated; but it does not seem to matter. In any case they were of brick. Numerous earthquakes have occurred in New Zealand, but only five have been attended by loss of life.

Turning to the particular facts, in two cases the workman was killed and the claims are by dependants; in the other two cases the workmen were injured and make the claims themselves.

In Brooker's case Brooker was employed as a "gut runner" in his employer's freezing works, Paki Paki, near Hastings. He was employed in the gut house, and at the time of the accident was employed on a staging about 4 feet above a table and 7 to 7 feet 6 inches from the ground. The access to the staging was from the table. When the shock came Brooker's mate escaped from the staging, but Brooker while stepping on to the table was pinned down by falling debris and killed.

Ryan was not killed. He was engaged at the same works as a slaughterman. He was working on the second floor. The floor began to collapse; he tried to get out but was thrown down at the spot where he was working, was covered with debris from the collapsing building and suffered severe injuries whereby he has been totally disabled.

Prendergast was employed by another firm of employers as a shepherd at their works at Tomoana. The sheep are slaughtered on the fourth floor of the works, being driven up a sheep race with a gradient of 1 in 2.9. Prendergast's duty was to drive the sheep up the sheep race and pen them. While standing on the fourth floor alongside the sheep race, by reason of the motion he lost his balance and fell down the sheep race, a distance of 119 feet. He was injured and totally disabled for fourteen weeks.

Ashwell was employed as a porter at an hotel in Napier. He had left the hotel in performance of his duty to post letters, get the mail and do some shopping for his employers in the course of his employment. He had just left a brick shop when he was killed by the falling of the building, the collapse of which was caused by the earthquake.

It was agreed before the Court of Appeal that the deaths and injuries were caused by "accident" and were in the course of employment. The question remains whether the accident arose "out of" the employment. On this topic there is a superfluity of authority. That some of the decisions conflict is undoubted, though the extent of variance is likely to appear greater than it is, if one ignores the essential feature of our procedure that appeals in such cases are on law only, and that a decision for a workman or an employer is often only a decision that there was evidence upon which the arbitrator could decide as he did. But amid the range of decisions firm land does emerge, and it appears to their Lordships of the highest importance to accept decisions of the ultimate tribunals which select definite principles. They gather that the learned members of the Court of Appeal allow themselves to be guided by the decisions of the House of Lords, and their Lordships would desire to follow the same course. Where statutory enactments have assumed the same language in so many parts of the Empire it is desirable that there should be uniformity of interpretation.

In their Lordships' opinion the question raised in this appeal has been finally decided in the United Kingdom by the decision of the House of Lords in the case which ought to be cited as *Simpson* v. *Sinclair*, but is too well known under the title *Thom* v. *Sinclair* (1) to be renamed. There a woman employed by a fishcurer was engaged in packing kippered herrings into boxes in a shed belonging to her employers which had brick walls and a roof of corrugated iron. While she was so engaged a brick wall, which was being constructed upon a neighbouring property not belonging to her employer, fell by reason of its instability on the shed, bringing the roof and part of the wall down and burying the applicant under the wreckage, whereby she was totally disabled. The arbitrator had found that the accident arose out of the employment; the Second Division of the Court of Session had reversed this finding. The House of Lords affirmed the arbitrator. It is to be noted that the force which brought down the shed was quite unconnected with the employment. The walls and roof of the shed were good enough. But the workwoman was injured by the collapse of her workshop, and in the opinion of the House of Lords it was immaterial to consider why the workshop walls collapsed.

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(1) [1917] A. C. 127.

Lord Haldane presided in a House where four Lords sat, and with his judgment Lord Kinnear agreed. In the course of his opinion he dealt with the suggestion that the accident must arise out of the nature of the employment, and says (1): "My Lords, there are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words 'arising out of.' Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and

(1) [1917] A. C. 134, 135.

there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged."

He then proceeds in a valuable passage to deal with causation in reference to this topic, and says (1): "If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go." And on the same page: "Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment, not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof."

He then proceeds to indicate that existing authorities are not inconsistent with this view. The judgments of Lord Shaw and Lord Parmoor appear to their Lordships to affirm the principle expressed by Lord Haldane.

The passages cited appear to their Lordships to negative conclusively the argument which was pressed upon them with great power by the respondents' counsel. The destructive force in their case, it was said, was a natural force quite unconnected with the employment. It exposed every one within the area to a similar risk of danger from falling walls.

In the case of such a "community risk," as it was labelled, a workman cannot say that an injury caused by such a happening arises out of his employment unless he can show that the nature of his employment exposed him more than other members of the public to the danger in question. To define the so-called "community risk" did not prove easy. Eventually it would appear that Mr. Greene threw over the view which seemed to find favour with some of the learned judges in the Court of Appeal that it depends upon the intensity and range of the destructive force. He would not have the distinction between the big earthquake and the little earthquake which seems to be found in the judgment of the Chief Justice. In his view a thunderstorm involved a community risk, and if a workshop chimney was struck by lightning and fell upon the workshop and injured a workman, he could not recover compensation unless he could show that by reason of the height or otherwise of the chimney he was especially exposed to the risk of that chimney falling as compared with other persons in the vicinity of chimneys. On this argument counsel found himself confronted with the passage quoted where Lord Haldane expressly refers to the remoter cause of the wall falling being a stroke of lightning. This passage was said to be obiter dictum and to be wrong.

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(1) [1917] A. C. 136.

Their Lordships, however, cannot agree to this. The illustration appears to be of the essence of the argument. In the course of the discussion the House of Lords had been referred to four cases of injury by natural forces, the two cases of lightning: *Andrew* v. *Failsworth Industrial Society, Ld.* (1), and *Kelly* v. *Kerry County Council* (2), and the two cases of frostbite: *Karemaker* v. *Owners of S.S. Corsican* (3) and *Warner* v. *Couchman* (4), where the principle had been adopted that where the injury was directly caused by such a natural force it has to be shown that the workman was especially exposed by reason of his employment to the incidence of such a force. Lord Haldane's exposition was obviously intended to comprise those decisions. The principle which emerges seems to be clear. The accident must be connected with the employment: must arise "out of" it.

(1) [1904] 2 K. B. 32.
(2) (1908) 1 B. W. C. C. 194.
(3) (1911) 4 B. W. C. C. 295.
(4) [1912] A. C. 35.

If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises, there is no need to make further inquiry as to why the accident happened.

This principle appears to be the foundation of the street risk decision, *Dennis* v. *A. J. White & Co.* (1), which finally decided that a workman employed to go into the streets on his master's business who is injured by a risk of the streets establishes an accident arising " out of " the employment, though the risk was shared by all members of the public using the streets in like circumstances. The same principle is adopted in *Upton* v. *Great Central Ry. Co.* (2), where the workman slipped on a railway platform and was held entitled to compensation. Lord Haldane reaffirms his conception of the kind of causation necessary to establish that an accident arises " out of " employment. The only other case to which it is desirable to refer is the more recent case of *Lawrence* v. *George Matthews* (1924), *Ld.* (3) In that case the present Lord Chancellor, whose special experience in these cases both at the bar and in the Court of Appeal gives exceptional weight to his opinion, declared the law to be in terms as their Lordships have stated it. The concurring judgment of Lord Russell of Killowen is on exactly the same lines, for his statement of what he calls " a locality risk " appears to conform with precision to Lord Haldane's exposition in *Thom or Simpson* v. *Sinclair.* (4) The phrase " dangerous spot " used in Lord Russell's judgment for this purpose

(1) [1917] A. C. 479.
(2) [1924] A. C. 302.
(3) [1929] 1 K. B. 1.
(4) [1917] A. C. 127.

appears to mean a spot which, in fact, turns out to be dangerous. In this connection it seems important to note that an expression of Lord Wrenbury's in *Allcock* v. *Rogers* (1), defining a dangerous place as a place which has some quality which results in danger, as, for instance, that an insecure wall which may fall exists there, must be taken to be limited by its context, which was that of a workman employed in a street who was injured by what the Courts held not to be a street risk—namely, the explosion of an enemy bomb in war time. If it were sought to be applied to the premises on which the workman was employed the definition would be too narrow and inconsistent with the decisions of the House of Lords already cited.

Their Lordships' attention was drawn to the various decisions in cases in which workmen were injured by bombs and shells from bombardment during the war. They do not refer to them in detail, for they appear to confirm the conclusions which their Lordships have reached. Neither bombs nor shells have ordinarily anything to do with a workman's employment. It is therefore necessary to show special exposure to injury by them. They represent exactly for this purpose the operation of such forces as lightning, heat and cold. It is said, how capricious is the working of the law. If the bomb injures a workman directly he must show special exposure; if it injures him indirectly by bringing the roof down on him he can recover unconditionally. It is almost impossible to give statutory protection in any case in which the line of distinction may not appear narrow; but the dividing principle adopted is authoritative and appears to their Lordships to be logical, and they feel bound to adopt it.

The substance of the matter is that in every case the words of the section alone are to be considered: "arising out of and in the course of the employment." It is with respect misleading to apply other terms whether derived from insurance law or other sources. It is not satisfactory, if a slight criticism on Lord Haldane's words may be permitted,

(1) (1918) 11 B. W. C. C. 149, 154.

to speak even of the proximate cause as determining the matter. In the case of death by lightning few could doubt that from an insurance point of view lightning would be the proximate cause whether the assured were or were not specially exposed to lightning, yet the problem—"arising out of"—is solved by considering the special exposure. The association therefore of the employment with the accident may be even closer than that of proximate cause. Whether "connected with" or as by Lord Loreburn in *Dennis* v. *A. J. White & Co.* (1) "incidental to" is the better term need not be decided. It is sufficient for their Lordships to say that it appears to them to have been authoritatively decided that where a workman is injured by the falling upon him of the premises where he is employed the accident necessarily arises out of the employment. This conclusion decides the two cases of Brooker and Ryan; Prendergast's case speaks for itself, and in their Lordships' view the case of Ashwell is within the decisions as to street risks and gives rise to a claim for compensation.

Their Lordships therefore will humbly advise His Majesty that these appeals be allowed and that the judgment in each case be varied by substituting yes for the answer to the second question. The respondents should pay the appellants' costs of these appeals.

Solicitors for appellants: *Wray, Smith & Halford.*
Solicitors for respondents: *William Hurd & Son.*

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(1) [1917] A. C. 479, 489.

[PRIVY COUNCIL.]

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July 27.

MAYOR, ETC., OF THE BOROUGH OF NEW PLYMOUTH . . . . . . APPELLANTS;

AND

TARANAKI ELECTRIC-POWER BOARD RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Construction of Statute—"Adjoining"—Supply of Electricity —Municipal Corporations Act, 1920 (*No.* 48 *of* 1920, *N. Z.*), *s.* 282.

The primary and exact meaning of the word "adjoining" is conterminous, and where the word is used in a statute it should be given that meaning unless the context shows that it is used in a looser sense as meaning near or neighbouring.

In s. 282 of the Municipal Corporations Act, 1920, of New Zealand, which authorizes a municipal council to contract with the local authority of any "adjoining district" for the supply thereto of electricity, the context does not show that the word "adjoining" is not used in its exact and literal sense. The section therefore does not authorize the council of a borough so to contract with the council of a neighbouring borough unless the boroughs are conterminous.

Judgment of the Court of Appeal of New Zealand [1932] N. Z. L. R. 1537 affirmed.

APPEAL (No. 34 of 1933) from a judgment of the Court of Appeal of New Zealand (October 19, 1932) reversing an order of the Supreme Court (September 1, 1932) upon an originating summons.

The question for determination upon the appeal was whether the appellant borough council, which by s. 282 of the Municipal Corporations Act, 1920 (N. Z.), had power to contract with the local authority of any "adjoining district" to supply electricity thereto, was thereby authorized so to contract with the councils of the boroughs of Inglewood and Waitara, which are situate respectively eight and six miles from the borough of New Plymouth and are nowhere conterminous with it.

The Court of Appeal (Myers C.J., Herdman and Kennedy JJ.), reversing an order of Macgregor J., had answered that question in the negative by unanimous judgments. The judgments of Macgregor J. and in the Court of Appeal are reported at [1932] N. Z. L. R. 1537.

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

1933. July 18. *Monckton K.C.*, *M. Gresson* and *Elverston* for the appellants.

Croom-Johnson K.C. and *A. A. Gordon Clark* for the respondents.

July 27. The judgment of their Lordships was delivered by

Lord Macmillan. Their Lordships have in this appeal to consider the meaning to be assigned to the word "adjoining" as employed in s. 282 of the Municipal Corporations Act, 1920, of New Zealand.

That section reads as follows: "A Council, having established electric-light works for the purpose of lighting the streets and public places of the borough and of supplying electricity to the inhabitants of the borough may (*a*) supply electricity to any person residing beyond the borough, with the consent of the local authority of the district in which the supply is given, and the provisions of this Act as to the supply of electricity to the inhabitants of the borough shall, so far as applicable, extend and apply to the case of such supply beyond the borough, and (*b*) contract with the local authority of any adjoining district to supply electricity to such local authority upon such terms and conditions as may be mutually agreed upon."

This section applies to the appellants, the council of the borough of New Plymouth, who are authorized by Orders in Council made under the Public Works Amendment Acts of 1908 and 1911 to supply electricity within an area of supply which embraces not only the borough but also a large surrounding territory.

The boroughs of Inglewood and Waitara lie outside but border on the appellants' area of supply. They are distant respectively eight miles and six miles from the borough of New Plymouth. By agreements entered into in 1924 and subsequently modified in 1928 the appellants contracted with

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the borough councils of Inglewood and Waitara to supply them with electricity, and have since been affording supplies to these boroughs. The supplies are delivered in bulk at a point in each case within the appellants' area of supply. By a local legislation statute passed in 1931 these agreements were validated but only up to September 30, 1933.

In view no doubt of the expiry of this period the present proceedings were initiated in the Supreme Court of New Zealand by an originating summons taken out by the respondents which submitted for determination the question on which the validity of the agreements depends—namely, whether the boroughs of Inglewood and Waitara are "adjoining districts" to the borough of New Plymouth within the meaning of the statute of 1920.

The matter came in the first instance before Macgregor J., who answered the question in the affirmative. The Court of Appeal in turn unanimously came to a contrary decision.

Their Lordships agree with the learned judges of the Court of Appeal that the primary and exact meaning of "adjoining" is "conterminous." At the same time it cannot be disputed that the word is also used in a looser sense as meaning "near" or "neighbouring." But, as Lord Hewart C.J. said in a recent case, where the question was as to the meaning of the word "contiguous": "It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred": *Spillers, Ld.* v. *Cardiff (Borough) Assessment Committee.* (1)

The context in the present case does not help the appellants as it helped the plaintiffs in *Cave* v. *Horsell.* (2) Indeed, it is rather against them, for in para. (*a*) of s. 282 reference is made to "any person residing beyond the

(1) [1931] 2 K. B. 21, 43.

(2) [1912] 3 K. B. 533.

borough," while in para. (*b*) the reference is to the local authority, not of any district beyond the borough, but of "any adjoining district." The contrast is significant.

In *Mayor of Wellington* v. *Mayor of Lower Hutt* (1) this Board refused to interfere with a judgment of the New Zealand Court of Appeal which decided that the City of Wellington was "adjacent" to the borough of Lower Hutt within the meaning of s. 219 of the former Municipal Corporations Act of 1900, although they were over six miles apart. It is noteworthy that Sir Arthur Wilson, in delivering their Lordships' judgment, said (2): "'Adjacent' is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near." The framers of the present Municipal Corporations Act in employing in s. 282 the word "adjoining" and not the word "adjacent" may well have had in mind the contrast thus drawn between the two terms and have designedly selected the stricter word.

But it is unnecessary to pursue the matter. It is enough to say that there is here no context constraining their Lordships to give to the word "adjoining" any other than its exact and literal meaning. Their Lordships thus see no reason to differ from, but on the contrary, every reason to agree with, the interpretation placed upon the word by the learned judges of the Court of Appeal.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The respondents will have their costs.

Solicitors for appellants: *Elvy Robb & Co.*

Solicitors for respondents: *Wray, Smith & Halford.*

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(1) [1904] A. C. 773.

(2) Ibid. 775.

[PRIVY COUNCIL.]

J. C.*
1933
July 27.

MINISTER OF NATIONAL REVENUE . APPELLANT;

AND

CATHERINE SPOONER . . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Revenue—Income War Tax—Sale of Land—Consideration including Royalty on Oil to be produced—Sum received in respect of Royalty—Income or Capital—Onus on appellant Minister—Income War Tax Act (*R. S. Can.*, 1927, *c.* 97,) *s.* 3.

The respondent sold all her right, title and interest in land which she owned in freehold to a company in consideration of a sum in cash, shares in the company, and an agreement to deliver to her 10 per cent. (described as a royalty) of oil produced from the land, on which the company covenanted to carry out drilling and, if oil was found, pumping operations. The company struck oil and paid to the respondent in 1927 10 per cent. of the gross proceeds of the oil produced, which she accepted in discharge of the royalty. The Supreme Court of Canada held that the sum so received was not an annual profit or gain within s. 3 of the Income War Tax Act, but a receipt of a capital nature, and that accordingly the respondent was not chargeable to tax in respect of it:—

Held, that it was for the appellant Minister to displace the view of the Supreme Court as being manifestly wrong, and that he had failed to do so.

Judgment of the Supreme Court [1931] S. C. R. 399 affirmed.

APPEAL (No. 72 of 1931) by special leave from a judgment of the Supreme Court of Canada (April 28, 1931) reversing a judgment of the Exchequer Court (October 23, 1930).

The respondent was assessed for the year 1927 under the Income War Tax Act, 1917, as amended, in the sum of $9570.41 which she had received under an agreement of April 15, 1925, for the sale by her of certain freehold land to a company, the above sum representing 10 per cent. of the gross proceeds of oil produced from the land.

The facts appear from the judgment of the Judicial Committee.

The Supreme Court of Canada, by a judgment delivered by Newcombe J. and concurred in by Duff, Rinfret, Lamont and

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

Cannon JJ., held (reversing the decision of the Exchequer Court) that the assessment should be set aside, as the receipt in question was not income as defined in s. 3, sub-s. 1, of the Act, but of a capital nature. The judgment is reported at [1931] S. C. R. 399.

1933. July 7. *C. F. Elliott K.C.* for the appellant. The sum received by the respondent cannot be treated as part of the consideration for the sale. The sale was of the land only. The respondent had no property in the oil, only a right to reduce it into possession: *Walls* v. *Midland Carbon Co.* (1) Moreover, a fixed price is essential to constitute a sale: *Milnes* v. *Gery.* (2) With regard to the oil the respondent became a joint adventurer with the company, and the money received was an annual profit or gain. Even if the royalty represented part of the consideration for the sale it was a taxable annuity, although it was of uncertain annual amount: *Chadwick* v. *Pearl Life Insurance Co.* (3); *Jones* v. *Inland Revenue Commissioners.* (4) [Reference was made also to *Lady Emily Foley* v. *Fletcher* (5); *Secretary of State for India* v. *Scoble* (6); *Delage* v. *Nugget Polish Co., Ld.* (7); *Constantinesco* v. *The King* (8); *Mills* v. *Jones* (9); and *Perrin* v. *Dickson.* (10)]

H. S. Patterson K.C. and *Horace Douglas* for the respondent were not called upon.

July 27. The judgment of their Lordships was delivered by

LORD MACMILLAN. The respondent, Mrs. Spooner, in the year 1927 received a sum of $9570.41 in circumstances set out in an agreed statement of facts. The question is whether this sum was "income" of the respondent within the meaning of the Income War Tax Act (Revised Statutes of Canada, 1927, ch. 97).

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(1) (1920) 254 U. S. 300.
(2) (1807) 14 Ves. 400, 408.
(3) [1905] 2 K. B. 507, 514.
(4) [1920] 1 K. B. 711, 714, 715.
(5) (1858) 3 H. & N. 769.
(6) [1903] A. C. 299.
(7) (1905) 21 Times L. R. 454.
(8) (1927) 11 Tax Cas. 730.
(9) (1929) 14 Tax Cas. 769.
(10) [1930] 1 K. B. 107.

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It appears that the respondent, who was the owner in freehold of a ranch in Alberta, entered into an agreement on April 15, 1925, with Vulcan Oils, Ld., a company incorporated under the laws of the Province of Alberta, and having for its objects "drilling for and procuring the production and vending of oil." By this agreement the respondent sold to the company all her right, title and interest in and to twenty acres of her land, "subject to the provisos, conditions and royalties hereinafter reserved." "In consideration of the said sale" the company agreed to pay to the respondent the sum of $5000 in cash on the execution of the agreement, to issue to her 25,000 full-paid shares of $1 each in the company, and further to deliver to her order "the royalty hereby reserved . . . . namely, ten per cent. of all the petroleum, natural gas and oil produced and saved from the said lands free of costs." The company undertook to deliver this percentage at least once in every thirty days, to keep and make available to the respondent proper books of account showing the quantity of petroleum, natural gas and oil produced from the lands, and to permit the respondent at all times to enter upon and inspect the workings. It was also agreed that the company should forthwith acquire the necessary plant and commence drilling as expeditiously as possible, and upon oil or petroleum being discovered should carry on the operation of pumping or otherwise procuring those products from the lands. "In the event of oil or gas being discovered in commercial quantities on the said lands" the respondent, "as part of the consideration for this agreement," covenanted to transfer to the company in fee simple the twenty acres already mentioned and also twenty additional acres, "reserving always, however, to the vendor the said royalty of ten per cent. of all petroleum, natural gas and oil in respect to the" first mentioned twenty acres.

The company duly commenced operations, and in the fall of 1926 struck oil in commercial quantities. In the year 1927 the company did not deliver to the respondent any of the oil produced, but sold the whole of it, and paid over $9570.41, being 10 per cent. of the gross proceeds, to the appellant, which sum she accepted in satisfaction of the "royalties" reserved to her under the agreement. When the present question arose the respondent had not yet conveyed the lands to the company and the title still remained in her own name.

The respondent in her income tax return for the year 1927 reported no income, but she was subsequently assessed to tax in respect of this sum of $9570.41 which she had received from the oil company, the amount of the tax being $301.07. The Minister of National Revenue, the present appellant, to whom the respondent appealed, confirmed the assessment subject "to adjustment as to depletion in accordance with s. 4 of c. 12 of the Statutes of 1928." The respondent having appealed to the Exchequer Court of Canada her appeal was dismissed by Audette J. On a further appeal to the Supreme Court of Canada the respondent obtained a unanimous judgment in her favour, setting aside the assessment. From this judgment the Minister of National Revenue has now appealed to His Majesty in Council.

The Income War Tax Act as amended contains the following definition of income: "3. For the purposes of this Act 'income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source; . . . ."

The Minister in this appeal maintains that the sum in question comes within the words "annual profit or gain from any other source."

The question whether a particular sum received is of the nature of an annual profit or gain or is of a capital nature does not depend upon the language in which the parties have chosen to describe it. It is necessary in each case to examine the circumstances and see what the sum really is, bearing in mind the presumption that "it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it": per Hanworth M.R. in *Perrin* v. *Dickson* (1), quoting previous authorities. It may be that ordinary mineral royalties, though not expressly mentioned in the definition section are taxable income in Canada, subject to an allowance for exhaustion. The term "royalty" occurs in s. 27 of the Act, which provides that any non-resident person who receives a royalty "for anything used or sold in Canada shall be deemed to be carrying on business in Canada and to earn a proportionate part of the income derived therefrom in Canada." This section may have been enacted to obviate the argument that the mere receipt of royalties is not a carrying on of business, as was decided in the excess profits duty cases: *Commissioners of Inland Revenue* v. *Marine Steam Turbine Co.* (2) and *Commissioners of Inland Revenue* v. *Korean Syndicate, Ld.* (3) It seems, however, to indicate that some "royalties" at any rate may be taxable income under the Act. But the share which the respondent became entitled to receive of the oil from the land which she had sold to the company was not a royalty in the sense of s. 27, or in the ordinary sense familiar in the case of mining leases where the lessor stipulates for payment by his lessee of a fixed rate per ton of the mineral won. Here there is no relation of lessor and lessee. The transaction was one of sale and purchase. It may have taken the form which it did because of the uncertainty whether oil would be found by the purchaser or not; as the value of the land depended on this contingency the price, not unnaturally, was made to depend in part on the event.

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(1) [1930] 1 K. B. 107, 119.
(2) [1920] 1 K. B. 193.
(3) [1920] 1 K. B. 598.

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The appellant, founding on a passage in the judgment of Audette J., where that learned judge said: "This royalty mentioned in the agreement is a reservation operating as an exception out of the demise . . . . of the profits derived from the working and development of this land," argued that there was really no sale to the company of the oil in the land, but only a sale of the right to search for oil and reduce it into possession on the terms that a percentage of whatever oil was found should remain the property of the respondent. But this is not really so. The agreement provides for a sale to the company of all the respondent's right, title and interest in the land, which includes the right to any oil which it may contain. The respondent was not in any sense a joint-adventurer with the company in the business of oil prospecting or oil production.

While their Lordships, of course, recognize that a profit or gain may be received in kind as well as in money it is not without some significance that the respondent bargained to receive her share in oil. What she has a right to is so much oil, and the fact that she has accepted a sum of money in the year in question in lieu of her share of oil does not affect the true position, though no doubt if she had taken her share in oil she would have been at the expense of marketing it and might not have received anything like the sum actually paid to her by the company.

Their Lordships have to deal with the transaction as they find it—namely, with a sale of land in consideration of which the purchaser agrees to give the vendor (inter alia) a percentage share of the oil to be obtained from the land sold. Capital may, no doubt, be expended in the acquisition of an income which, in the recipient's hands, becomes a proper subject of income tax, as was pointed out in the passage quoted by Newcombe J. from the judgment of Rowlatt J. in *Jones* v. *Inland Revenue Commissioners*. (1) But in the same volume, in a case where the liquidators of a company had sold its assets, including certain patent rights, to a new company for a sum in cash, a block of shares and a royalty

(1) [1920] 1 K. B. 711, 714, 715.

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on every machine sold, the same learned judge had characterized the royalties as being "in effect payment by instalments of part of the price of the property which the respondent company had finally disposed of to the new company": per Rowlatt J. in *Commissioners of Inland Revenue* v. *Marine Steam Turbine Co.* (1)

Into which category, then, does the present case fall? Their Lordships agree with Newcombe J. that "the case is not without its difficulties," as all cases must be which turn upon such fine distinctions, but they are not prepared to differ from the view of the transaction which that eminent judge took, and with which all his colleagues agreed—namely, that "the respondent has converted the land, which is capital, into money, shares and 10 per cent. of the stipulated minerals which the company may win . . . . there is no question of profit or gain, unless it be as to whether she has made an advantageous sale of her property." It was for the Minister to displace this view as being manifestly wrong. In their Lordships' opinion he has failed to do so.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed and the judgment of the Supreme Court affirmed. The respondent will have her costs of the appeal as between solicitor and client.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Lawrence Jones & Co.*

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(1) [1920] 1 K. B. 193, 203.

[PRIVY COUNCIL.]

BATU PAHAT BANK, LIMITED . . . APPELLANTS ;

AND

OFFICIAL ASSIGNEE OF THE PROPERTY OF TAN KENG TIN . . . RESPONDENT.

J. C.*
1933
July 13.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Straits Settlements—Banking Company—Loan to Customer—Articles of Association—Lien on Shares—Validity of Security—Construction of Ordinance — Ordinance imposing Penalties — Ordinance No. 155 (*Companies*), *s.* 111.

In 1921, a banking company incorporated in the Straits Settlements made an unsecured loan to a customer who was the registered holder of fully paid shares in the company. By art. 5 of the company's articles of association no part of the funds of the company were to be lent on its shares. In 1927 art. 29, which previously referred only to such shares as were not fully paid up, was altered so as to provide that the company should have a lien upon all shares registered in the name of a member for all debts from him to the company. Sect. 111 of Ordinance No. 155 (Companies) provided by sub-s. 3 (added in 1923) that no banking company should lend any part of its funds upon the security of its shares, and by sub-s. 4 that if any loan was made in contravention of the section any director of the company should be liable to a fine, also to pay any portion of the loan which remained unpaid after deducting the amount realized on the securities. In 1929, the borrower having been adjudicated a bankrupt, the company claimed a lien on his shares for the unpaid balance of the loan :—

Held, that art. 29, as altered in 1927, created an effective lien on the borrower's shares. As the loan had already been made, art. 5 did not prevent a lien attaching in 1927 ; and the security was not invalidated by s. 111, sub-s. 3, of the Ordinance, because, upon the true construction of the section, it merely prohibited the making of a loan on the security mentioned under pain of the specified penalties and liabilities.

Judgment of the Supreme Court of the Straits Settlements reversed.

APPEAL (No. 91 of 1932) from a judgment of the Supreme Court of the Straits Settlements (Singapore), appellate jurisdiction, dated July 16, 1932, affirming a judgment of Terrell J., dated March 11, 1932.

* *Present :* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

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The appellants were a Chinese banking company incorporated in 1919 under the Companies Ordinance, 1915, of the Straits Settlements. The respondent was the official assignee of the property of Tan Keng Tin, who had been adjudicated a bankrupt in 1929 by the Supreme Court. The bankrupt was, and since 1919 had been, the registered holder of 110 fully paid shares in the appellant company, and a customer of the bank.

The question for determination in the appeal was whether the appellants had a lien on the bankrupt's shares for the sum due to them in respect of a loan of $10,000 made to him in 1921, having regard to the articles of association of the appellant company and the provisions of s. 111 of Ordinance No. 155 (Companies)—Revd. Laws of the Straits Settlements, 1925.

The facts and the material provisions of the articles and of the Ordinance appear from the judgment of the Judicial Committee.

On a summons in the bankruptcy proceedings Terrell J. held that the appellants were not entitled to the lien which they claimed. That decision was affirmed on appeal by Murison C.J. and Burton J., Whitley J. dissenting.

1933. May 18, 19. *Sir Gerald Hurst K.C.* and *Myles* for the appellants. It was concurrently found that the overdraft or loan was upon the borrower's personal security; the transaction, therefore, was not a contravention of art. 5 of the articles of association. Upon the alteration of art. 29 in 1927 the company automatically obtained a lien on the borrower's shares, unless s. 111 of the Ordinance precluded that result: *Allen* v. *Gold Reefs of West Africa, Ld.* (1) In the absence of proof that the appellants deliberately continued the loan relying on the lien, the loan did not become a loan on the security of the shares so as to be within sub-s. 3 of the Ordinance: *In re National Bank of Wales.* (2) But even if there was a breach of s. 111, sub-s. 3, of the Ordinance the security was not thereby invalidated. As sub-s. 3 does

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(1) [1900] 1 Ch. 656.

(2) [1899] 2 Ch. 629, 675, 676.

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not in terms invalidate the security, the penalties and liabilities prescribed by sub-s. 4 are the only remedy for a breach: *Learoyd* v. *Bracken.* (1) The provision at the end of sub-s. 4 as to realizing the securities supports that construction.

Micklethwait K.C. and *A. W. Cockburn* for the respondent. Art. 29, as amended, applies only to such debts and obligations as were not prohibited by art. 5 or otherwise. Having regard to the wording of art. 5 it prohibited not only a transaction of lending, but also the bank's funds being upon loan upon security of its shares. The article applied therefore in 1927, although the loan had been made in 1921. If art. 5 prohibited only the actual transaction it would be so easy to evade as to be illusory. The borrower as a shareholder was as fully bound by art. 5 as if he had covenanted in its terms: *Bradford Banking Co.* v. *Henry Briggs, Son & Co.* (2) Even if the lien claimed did not conflict with art. 5, no lien arose in the circumstances. The loan was made at a high rate of interest entirely apart from the borrower's position as a shareholder; in relation to it he is to be regarded as an "outsider." The company, therefore, could not by altering its articles give themselves a lien which they did not possess under the contract: *Allen* v. *Gold Reefs of West Africa, Ld.* (3); *Baily* v. *British Equitable Assurance Co.* (4) The decision last mentioned was reversed by the House of Lords, but only upon the ground that the contract there did not exclude power to alter the company's regulations. (5) But in any case s. 111 of the Ordinance prevented any lien attaching. Sub-s. 3 expressly prohibited the company from lending upon the security of its shares, and although penalties are imposed by sub-s. 4, the express prohibition renders the security invalid: *Anderson, Ld.* v. *Daniel* (6); *Whiteman* v. *Sadler.* (7) The "securities" referred to in sub-s. 4 are securities properly taken under sub-s. 1, and not securities taken improperly,

(1) [1894] 1 Q. B. 114.
(2) (1886) 12 App. Cas. 29, 33.
(3) [1900] 1 Ch. 656, 674.
(4) [1904] 1 Ch. 374, 385.
(5) [1906] A. C. 35.
(6) [1924] 1 K. B. 138, 143.
(7) [1910] A. C. 514, 525.

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whether under sub-s. 1 or sub-s. 3. Sect. 111 was enacted for the purpose of protecting shareholders and policy holders, and should be construed with that purpose in view: *Rein* v. *Lane* (1); *National Bank of Australasia* v. *Cherry*. (2)

Sir Gerald Hurst K.C. in reply. The words of art. 5 do not bear the construction sought to be put upon them. It is to the advantage of the shareholders, not to their prejudice, that the lien should be enforceable.

July 13. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The question for decision on this appeal is whether the appellants (who are a banking company limited by shares) are entitled to a lien on 110 fully paid shares in that company registered in the name of one Tan Keng Tin.

The company was registered in Singapore on August 20, 1919, under the Companies Ordinance, 1915, of the Straits Settlements. Tan Keng Tin was one of the original shareholders, having subscribed and paid in cash for 110 fully paid shares of $100 each.

The articles of association of the company contained the following provisions:—

"5. No part of the funds of the company shall be employed by the directors or the company in the purchase of or lent on the company's shares.

29. The company shall have a first and paramount lien upon all the shares (not fully paid up) registered in the name of each member (whether solely or jointly with others) for all calls upon such shares and also for all debts, obligations, engagements and liabilities of such member solely or jointly with any other person to or with the company whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not.

30. For the purpose of enforcing such lien the directors may sell the shares subject thereto to any number but no sale shall be made until the time for such payment, fulfilment or discharge as aforesaid shall have arrived, and notice in

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(1) (1867) L. R. 2 Q. B. 144, 151.

(2) (1870) L. R. 3 P. C. 299.

writing of the intention to sell shall have been served on such member holding the shares or his representatives and default shall have been made by him or them in payment, fulfilment or discharge of such debt, liabilities or engagements within fourteen days after such notice."

In 1921 Tan Keng Tin, who was a customer of the bank, obtained a loan from the company of $10,000. The evidence as regards this transaction, and indeed, as regards the whole case, is meagre. The transaction is referred to as the obtaining of an overdraft for $10,000, which was reduced later to $9000. At the inception of the loan Tan Keng Tin signed some document, of which there are no particulars. At a later date (December, 1928) at the request of the bank, who represented that the original document "was affected by effluxion of time," he signed a promissory note for $9000, being apparently the amount then due. This document was, for some unexplained reason, signed by him both in his own name and in the name of a business firm of which he was the sole member, and which had ceased to carry on business. From these facts it would appear that the transaction was an immediate advance in 1921 by the bank of $10,000 on loan account (subsequently paid off to the extent of $1000), and not an overdraft in the ordinary sense of a current account overdrawn to varying amounts from day to day.

In the year 1923 the law relating to banking companies and certain other companies was amended by inserting a new provision into s. 111 of the Ordinance No. 155 (Companies) (formerly s. 108), and by altering the wording in other respects.

The amended section runs thus, the new provision being sub-s. 3 :—

"*Banking and certain other companies.*

111.—(1.) No loan shall be made by any banking or insurance company or by any deposit, provident or benefit society to any director or officer of such company or society or to any firm of which any director or officer of such company or society is a partner, except upon securities in which a trustee may invest under the powers of Ordinance No. 144

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(Trustees) and the value of which exceeds the amount lent by 30 per centum.

(2.) A list containing the amounts lent every month under sub-section (1.) and the names of the directors or officers to whom such loans have been made together with the amounts previously lent which have not been repaid shall be prepared, and a copy thereof shall on or before the first Monday in every succeeding month be sent to the Registrar.

(3.) No such company as aforesaid shall lend any part of its funds upon the security of its shares.

(4.) If any loan is made in contravention of this section, any director or manager of the company or society shall be liable to a fine not exceeding $1000, and shall also be liable for the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities.

(5.) If default is made in complying with sub-section (2.) any director or manager of the company or society shall be liable to a fine not exceeding $50 for every day during which the default continues.

(6.) For the purposes of this Ordinance a company which carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company."

In the year 1927 the 29th article of association of the bank was amended by striking out the words in brackets—namely, "not fully paid up."

On October 4, 1929, Tan Keng Tin was adjudicated bankrupt. A dispute then arose between the bank and the official assignee, the former claiming a lien on the shares, the latter disputing the claim, with the result that the official assignee took out a summons in the bankruptcy by which he claimed that the 110 shares were "part of the property of the bankrupt." The true question for decision, however, was, and was correctly stated in the evidence to be, "has the bank a valid lien on these shares?"

On the hearing of the summons Terrell J. made an order declaring that the bank had no valid lien on the shares. On appeal the Court of Appeal of the Supreme Court of the Straits Settlements dismissed the appeal (Whitley J. dissenting).

Terrell J. held that no money had been advanced to Tan Keng Tin on the security of his shares, but that the effect of s. 111, sub-s. 3, of the Ordinance was to invalidate any security for a loan by the company purported to be created on the company's shares and to render art. 29 of the bank's articles of association pro tanto ultra vires; with the result that no lien attached.

On the appeal Murison C.J. and Burton J. seem to have agreed in substance with that view. On the other hand Whitley J. was of opinion that s. 111 did not invalidate a security given in contravention of s. 111, sub-s. 3, and that accordingly art. 29 was not ultra vires.

Their Lordships agree with the conclusion of Whitley J., and are of opinion that the bank have a valid lien on the shares.

In 1921 the bank lent $10,000 of its funds to Tan Keng Tin. This money was not lent upon his shares, because (even assuming that a lien attaching under art. 29 at the moment of a loan by the company would make that loan a loan on the company's shares within the meaning of art. 5) no lien did attach at the moment of this loan because the shares were fully paid shares.

The alteration of the articles in the year 1927 would (apart from the effect of s. 111, sub-s. 3, of the Companies Ordinance) operate to create an effective lien on the shares in favour of the bank: *Allen* v. *Gold Reefs of West Africa, Ld.* (1) There is nothing in art. 5 to prevent this, for the funds had already been lent in 1921; and their Lordships are unable to find any grounds upon which it can be said that there was any loan of the company's funds to Tan Keng Tin on any later date.

The question then arises whether s. 111, sub-s. 3, of the Companies Ordinance operates to invalidate the security or whether it merely prohibits the making of a loan on security under pain of incurring the specified penalties and liabilities. The answer to this question, which is the crucial question in

(1) [1900] 1 Ch. 656.

the case, depends upon the true construction of the language used in the section, and this, in their Lordships' opinion, is, by sub-s. 4, made reasonably clear. Sub-s. 4 deals in terms with the case of "any loan . . . . made in contravention of this section." It was argued that this sub-section only refers to a loan made in contravention of sub-s. 1; and that the words "the securities" refer only to the securities for a loan within sub-s. 1. Their Lordships cannot so hold, without giving to the words used a meaning which they simply do not bear. Sub-s. 5 shows that the legislative power, when it desired to do so, did in terms refer to the infringement of a particular sub-section. Their Lordships can do no other than say that sub-s. 4 means what it says, and that it deals with *any* loan made in contravention of the *section*, including, therefore, a loan by a banking company of part of its funds upon the security of its shares. If that event happens sub-s. 4 specifies the consequences, and they include a personal liability on directors and managers for "the payment of any portion of the amount lent which remains unpaid after deducting the amount realized on the securities." This is a recognition by the sub-section of two things: (1.) the continuance of the security on which the loan was made and (2.) the discharge of the debt pro tanto by the proceeds of its realization. In the face of this it seems to their Lordships impossible to say that s. 111, sub-s. 3, operates to invalidate a lien which would, apart from that sub-section, be an effective lien.

For these reasons their Lordships are of opinion that the appeal should succeed, that the orders of Terrell J. and of the Court of Appeal should be set aside, and an order made declaring that the bank have a valid lien on the 110 fully paid shares for the principal and interest due to them in respect of the loan. The appellants should have their costs here and below, which in the event of any insufficiency of the bankrupt's estate can be added to their security. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Peacock & Goddard.*

Solicitors for respondent: *Baileys, Shaw & Gillett.*

[PRIVY COUNCIL.]

B. R. LAWRENCE . . . . APPELLANT; J. C.*

AND 1933

THE KING . . . . RESPONDENT. *July* 20.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Criminal Code—Privy Council Practice—Inadequacy of Direction to Jury—Onus of Proof—Alteration of recorded Sentence in absence of Accused—Substantial and grave Injustice.

If in a criminal case the judge fails to make sure that the jury appreciate the essential principle that the charge must be established beyond a reasonable doubt, the omission is as grave an error as active misdirection in the elements of the offence, and is a disregard of the essential forms of justice. Where in such a case the jury have returned a verdict of guilty, unless it can be predicated that properly directed they must have returned the same verdict, a substantial miscarriage of justice appears to be established.

A judge has no jurisdiction after the discharge of the jury and in the absence of the accused to alter the sentence recorded at the trial, even if the term of imprisonment is not effectively altered though distributed among the counts so as to avoid exceeding the maximum punishment on some of them.

The appellant was tried in Nigeria by a judge sitting with a mixed jury upon charges of stealing sums of money and falsifying accounts. He was convicted and sentenced to imprisonment, the conviction and sentence being confirmed by the Supreme Court. Upon appeal the Judicial Committee, applying the above principles to the facts of the case, held that there had been a disregard of the forms of legal justice by which substantial and grave injustice had been done, and that accordingly the conviction and sentence should be set aside.

In re Dillet (1887) 12 App. Cas. 459, and *Rex* v. *Hales* (1923) 17 Cr. App. R. 193 applied.

APPEAL (No. 83 of 1932) by special leave from a judgment of the Supreme Court of Nigeria (April 29, 1932) affirming, on a case stated, the convictions of the appellant at a trial at special assizes at Lagos and sentences as recorded by the trial judge subsequently.

The facts are fully stated in the judgment of the Judicial Committee.

1933. June 15, 16, 19. *T. J. O'Connor K.C.* and *St. J. Hutchinson* for the appellant. There was in connection with the trial a disregard of the forms of legal process devised for doing justice in criminal matters. The sixteen counts upon which the appellant was tried included six containing new charges upon which he had not been committed. The trial judge in his summing-up grouped the counts into three charges of mixed felonies and misdemeanour and failed to direct the jury that they must consider the several counts separately. He did not direct the jury that they must give the appellant the benefit of any reasonable doubt, nor that upon the charges of false accounting proof of a dishonest intent was essential. The sentence of three years' imprisonment recorded at the trial was invalid, as the maximum punishment for false accounting was two years' imprisonment. The trial judge had no jurisdiction to alter the record of the sentence after the close of the assizes and in the absence of the appellant: *Rex* v. *Hales.* (1) The cumulative effect of the many defective methods pursued was that the appellant suffered substantial and grave injustice, bringing the case within the practice of the Board in criminal matters.

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* *Present:* LORD ATKIN, LORD THANKERTON, and SIR GEORGE LOWNDES.

Sir Thomas Inskip A.-G. and *Kenelm Preedy* for the Crown. In *Rex* v. *Hales* (1) no sentence had been pronounced in the presence of the accused. Under the revised sentence in the present case the appellant was to undergo the same effective period of imprisonment as under the sentence pronounced at the trial. The revision of the sentence was no doubt an irregularity, but the appellant suffered no substantial prejudice. There were no such defects in the summing-up as to bring the matter within the limited class of cases in which the Board will advise interference in a criminal proceeding: *Ex parte Macrea* (2); *Arnold* v. *The King-Emperor.* (3)

[LORD ATKIN. Cases later than *In re Dillet* (4) really add nothing to the rule of the Board there laid down.]

That the onus was on the prosecution had been fully brought to the attention of the jury by counsel for the accused, and was conceded by counsel for the Crown. The absence of a statement to that effect by the trial judge therefore did not vitiate the summing-up: *Rex* v. *Quinn* (1); *Rex* v. *Schiff*. (2) There was no denial to the appellant of natural justice nor any substantial injustice to him.

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(1) 17 Cr. App. R. 193.
(2) [1893] A. C. 346.
(3) [1914] A. C. 644, 645.
(4) 12 App. Cas. 459.

T. J. O'Connor K.C. replied.

At the conclusion of the argument their Lordships, after consultation, stated that they would humbly advise His Majesty to allow the appeal, and that their reasons would be delivered later.

July 20. The reasons of their Lordships' report were delivered by

LORD ATKIN. This is an appeal in a criminal case by special leave from a judgment of the Full Court of the Supreme Court of Nigeria affirming on a case stated a conviction and sentence upon the appellant on a trial at the special assizes at Lagos before Berkeley J. and a special jury. After the hearing before their Board their Lordships announced that they would humbly advise His Majesty that the appeal should be allowed and the conviction set aside, and that they would give their reasons for their report later, which they now proceed to do.

The appellant in November, 1931, was an officer in the Administrative Service of Nigeria of about seventeen years' standing. He was at that time, and had been during the year 1931, District Officer in charge of the district of Ilorin in that Province, and was also in charge of the Ilorin Emir's Native Administration. On November 15, 1931, he left Ilorin on leave for England. In December he was arrested in England on a warrant in pursuance of the Fugitive Offenders Act charging him with having stolen 150*l*. in two bags of silver, the property of the Nigerian Government. Eventually he was remanded in this country in order to enable him to return voluntarily to Nigeria to meet the charges. On his return on February 29, 1932, he was charged before the

(1) (1911) 6 Cr. App. R. 269.

(2) (1920) 15 Cr. App. R. 63.

police magistrate at Lagos both with the theft of the silver and with four other offences of stealing by cheques sums of 25*l.*, 35*l.*, 10*l.* and 35*l.* in May, June and October, 1931, and also of false accounting in respect of these cheques under s. 439 of the Criminal Code. On March 9 he was committed for trial at the assizes of Lagos. On March 18 an information was filed by the Attorney-General containing sixteen counts, being the charges on which the appellant was committed together with six additional charges of false accounting.

On March 29 the trial began before Berkeley J. and a mixed special jury of Europeans and natives. The trial occupied twelve days and resulted on April 9 in the appellant being acquitted on the original charges of stealing the bags of silver, but convicted of the remaining charges. He was sentenced to three years' imprisonment. Thereupon the jury were discharged and the assizes closed. The judge had been asked to state a case, which he was prepared to do upon the points of law relied on being filed within three days. Meanwhile the attention of the learned judge appears to have been called to difficulties in preparing the warrant of commitment. The maximum sentence on the charge of false accounting is two years. On the application of the Solicitor-General, who conducted the prosecution, the learned judge in chambers, and in the absence of the accused, proceeded to draw up and record a revised sentence according to which on the counts for stealing the accused was to receive two years' imprisonment; on the counts for false accounting, one year's imprisonment; on the first two counts the sentences were to be consecutive; on all the other counts the sentences were to be concurrent with the first two. In accordance with this sentence the warrant of commitment upon which the accused has served part of the sentence was drawn up. The case stated by the learned judge was heard by the Full Court on April 23, 25 and 26, and on April 29, 1932, the Full Court delivered a considered judgment affirming the judgment below. Up to this date the accused had been on bail. He served part of his sentence until upon the order giving special leave to appeal being made he was released on bail on July 30, 1932, by order of the acting Chief Justice. He has been on bail since that date.

To appreciate the nature of the charges made against the appellant it is necessary to state generally the ordinary course of administration at the relevant dates. The appellant's pay and allowances amounted to from 60*l.* to 68*l.* a month. His private account was kept at the Bank of British West Africa at Oshogbo. The account of the Native Administration of Ilorin was kept at the Colonial Bank at Ibadan. The appellant kept the cheque-book of that account and alone had power to draw. There was considerable expenditure in the course of the year in connection with the native police and prison equipment and works, and cheques would be drawn in payment of traders' accounts, and also to provide cash for administrative purposes. The appellant moreover, if he desired to remit to his own bank, would on occasions draw a cheque on the Native Administration account, at the same time paying to the cashier of the Native Administration office cash representing the amount. So far as the appellant was concerned apparently the only record made by him of the cheques, and the purpose for which they were drawn, was in the counterfoil of each cheque. The counterfoils were from time to time entered in the Native Administration cash-book by the native cashier. It is unnecessary to emphasize the looseness of this system, but it was in existence when the appellant came into office, and has now been altered.

The charges upon which the appellant was convicted range themselves into two groups. The first group comprising counts 3–10 inclusive relate to cheques dated May 9, 1931, for 17*l.* 1*s.*; May 4, 1931, 25*l.*; August 18, 1931, 35*l.*; May 9, 1931, 35*l.* In all the cases the cheques were drawn in favour of local tradesmen and the counterfoils respectively recorded "Green fezzes" (which would be part of the prison warders' equipment), "Blue drill," "Blue cloth" and "Khaki drill."

In respect of the first mentioned cheque there was evidence by the tradesman representative that the amount due for green fezzes was 7*l.* 1*s.*, and that he handed the balance of the cheque to the appellant personally. In respect of the cheques of May 4, 25*l.*, and August 18, 35*l.*, the evidence of the tradesmen who had received the cheques was that there were no sums owing to them at that time for "blue drill" and "blue cloth," that the cheques appeared to be for cash, but no evidence was given of any payments to the appellant. In respect of the cheque, May 9, 35*l.*, the evidence of the tradesman was that no amount was owing for "khaki drill" and that the cheque was exchanged for cash which the witness handed to the appellant himself. The appellant was unable to remember the actual transactions, and could only say that he denied receiving any cash. It is obvious that in the case of the first and fourth cheques there was evidence upon which a jury properly directed could find a verdict against the appellant of misappropriating 10*l.* and 35*l.*, and necessarily, in consequence, of falsely accounting in the counterfoils.

The second group of charges is on counts 11 to 16 inclusive. They contain no charge of stealing, and it is significant that the Crown did not make it part of their case that in these cases any money had been stolen or lost. The charges relate to cases where in respect of two cheques of different dates the amount of the one has been entered in the counterfoil of the other. In all cases the earlier cheque was a cheque in favour of the appellant's bank for 30*l.* paid into his account, but the cheque is entered on the later counterfoil. The later cheque was for a tradesman's account and is entered on the earlier counterfoil. Neither counterfoil could have been filled up until the later date, and the appellant's case was that in the stress of work he had neglected to fill up the counterfoils at the time and had carelessly filled them up later from memory. If the appellant had no right to draw the cheque in his favour when he did the obvious suggestion is that he misappropriated the proceeds of the cheque at the time, and concealed the transaction until he drew correctly the later cheque, when out of his own funds he made good to the cashier the amount he had previously stolen. This suggestion was directly made before their Lordships by counsel for the Crown. But at the trial this suggestion apparently was not made and no question was directed in cross-examination to the appellant to support it, nor was any evidence given that the cheques drawn by the appellant in favour of his bank were unauthorized. In these circumstances the appellant's defence of carelessness appears to have been worthy of close consideration, and it was especially important that the jury should have been adequately directed as to the meaning of "knowingly furnishing a false statement or return of money" which is the offence charged; and as to the importance of the absence of motive if the suggestion of misappropriation was not put forward by the Crown.

The grounds for appeal put forward by the appellant are: (1.) The absence of any adequate direction to the jury as to the issues they had to try. (2.) The invalidity of the recorded sentence. It is evident from what has been said that the case was complicated. The issue of larceny had to be kept separate from that of knowingly furnishing a false statement; and in view of the lax system which existed in the Native Administration office, it was important to distinguish between carelessness and intentional wrong-doing. Moreover, the information consisted of at least three groups of charges; and each count in each group had to be separately considered. The appellant objected that the second and third groups ought not to have been joined with the two separate felonies of stealing the bags of silver charged in the first two counts. Their Lordships are inclined to agree, but they would not be prepared to interfere with the conviction on this ground. The appellant was in fact acquitted on these charges, and there is nothing to indicate that any substantial injustice was done by the error in procedure. The appellant, nevertheless, is entitled to say that the number of the various charges required careful separate consideration, and on this point he criticizes the summing-up. The learned judge in his direction to the jury styles the various groups of counts as charges first, second and third, and in dealing with them though he points out that the facts in each pair of counts are different, as far as their Lordships see he nowhere directs the jury that in respect of each charge the jury might convict on one pair of counts and acquit on the others. It has already been pointed out that on counts 5 and 7 any direct evidence of larceny was absent. Moreover, the learned judge took a general verdict of the jury on first charge, second charge and third charge, and though the verdict appears to have been put in order by taking the assent of the jury to a verdict of "guilty on counts 3 to 16," it is difficult to resist the impression that the jury were to consider all the counts in the second charge, convicting on all or none, and so as to the counts in the third charge. Inasmuch, however, as there would be evidence to support counts 3 and 4 and 9 and 10, it would not be in accordance with their Lordships' principles in dealing with criminal appeals to interfere with the conviction if the appeal rested upon this objection alone.

A more important objection is that throughout the judge's charge he did not give the jury any direction at all as to the onus of proof, or that the accused was entitled to the benefit of a reasonable doubt. Their Lordships have no doubt that this was due to inadvertence, for when the learned judge stated a case for the Full Court he states in it that though he has to rely on his memory he is able to say "that the jury were sufficiently instructed by me that the onus of proof rested on the prosecution and that the accused should be given the benefit of the doubt." Unfortunately the learned judge's memory failed him, for there is not a word of either topic in the shorthand record of the summing-up which was adopted in the Full Court as accurate. Indeed, so far as the charge dealt with the matter at all it seems to have suggested to the jury that the accused in two cases had the money, and that if he could not account for it the Crown had made out their case. The true direction would be that the onus was always on the Crown but that if the jury believed that the accused had the money, and were not satisfied that his reason for not accounting for it was true, there was evidence upon which they might if they chose find him guilty of stealing.

Before the Full Court the Crown had to fall back upon the contention that as the defence had laboured the question of onus and counsel for the prosecution had, while dealing with two of the counts, said that the jury must give the accused the benefit of any reasonable doubt the defect in the summing-up was cured. Their Lordships cannot accept this view in this case. It often happens that the issues have been so clearly stated and agreed to by counsel on both sides that the trial judge and an appellate Court is satisfied that the jury can have been under no misapprehension on the point of onus, and that further comment by the judge is unnecessary. But, speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has to be established by the prosecution beyond reasonable doubt: and it is essential that the tribunal of fact should understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case, unless it can be predicated that properly directed the jury must have returned the same verdict, a substantial miscarriage of justice appears to be established. In the present case it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence; they look to the judge for authoritative statement of it, and in the present case there appears to be no sufficient ground for supposing that the jury had present to their minds the governing principle of our law as to onus of proof. Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt.

But in addition to this vital defect in the procedure up to verdict there has to be considered the alteration and recording of the sentence in the absence of the accused. It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused ; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid. In the present case a double error has been made. In the first place the general sentence of three years' imprisonment is invalid, for it is applicable to each count, and for the offences charged in the counts for false accounting the maximum punishment is two years. If the matter rested here it would appear that upon case stated the appellate Court under s. 171 of the Criminal Procedure Ordinance would have had power to reverse, affirm or amend the judgment. But unfortunately the learned judge in chambers in the absence of the accused and apparently at the request of the Solicitor-General varied the sentence on the record, by substituting on the record a sentence of one year's imprisonment on the third count and two years' imprisonment on the fourth count to run consecutively, and corresponding sentences on the remaining counts for false accounting and larceny all to run concurrently with the sentences on the counts 3 and 4 and with each other. The warrant of commitment recites this sentence as being that which the sheriff is directed to carry into execution according to law. This is the sentence which it was necessary to appeal against. Their Lordships cannot agree with the appellate Court that it was merely an elaboration of a previous sentence. It was a new and different sentence passed in circumstances in which the judge had no possible jurisdiction to pass any sentence even if, which is doubtful, in point of time his power to pass sentence at all still continued. There appears to have been no sentence at all which could be amended, and their Lordships find themselves in accord with the decision on this point of the Court of Criminal Appeal in *Rex* v. *Hales* (1), where a reserved sentence was passed in the absence of the accused convicted in a different county, and the Court quashed the conviction. But, without finally deciding whether the case could have been remitted to the appellate Court for the sentence to be amended, their Lordships are clearly of opinion that in the circumstances which they have detailed no such order should be made. In their opinion there has been disclosed, in the words of Lord Watson expressing the judgment of the Board in *In re Dillet* (2), a disregard of the form of legal justice by which substantial and grave injustice has been done, and they therefore, after the hearing, humbly advised His Majesty that the conviction and sentence should be set aside.

Solicitors for appellant: *Church, Adams, Tatham & Co.*
Solicitors for Crown: *Burchells.*

(1) 17 Cr. App. R. 193.

(2) 12 App. Cas. 459.

[PRIVY COUNCIL.]

J. C.*
1933
July 27.

PROVINCIAL TREASURER OF ALBERTA AND ANOTHER . . . . } APPELLANTS;

AND

C. E. KERR AND ANOTHER . . . . . RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada (Alberta)—Legislative Power of Province—Duties payable on Death—Personal Property outside Province—Indirect Taxation—Succession Duties Act (R. S. Alta., 1922, *c.* 28, *as amended)—British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2.

Under the British North America Act, 1867, s. 92, head 2, a Province is not entitled to impose taxation payable on the death of a person therein domiciled in respect of his personal property locally situate outside the Province, but is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the Provincial law of personal property so situate. Personal property outside the Province cannot be treated for the above purpose as within it by an application of the principle mobilia sequuntur personam': that principle relates to the law governing the devolution of personal property, not to its local situation.

If a Provincial statute imposing succession duties makes the executor personally liable for the duties the taxation is indirect and therefore invalid; that rule is not confined to the case of property within the Province.

Upon the true construction of the Succession Duties Act of Alberta the executor is made personally liable for the duties, and as to personal property outside the Province the duties are imposed upon the property itself, not upon its transmission. Consequently, as to property within the Province the taxation is invalid, because it is not direct, and as to personal property outside the Province it is invalid, both because it is not direct and because it is not within the Province.

Review of the decisions of the Judicial Committee upon both the above matters.

In re Cust (1915) 8 Alb. L. R. 308 disapproved.

Appeal from the judgment of the Supreme Court of Alberta dismissed and cross-appeal allowed.

CONSOLIDATED CROSS-APPEALS (No. 1 of 1933) from a judgment of the Appellate Division of the Supreme Court

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

J. C.
1933
PROVINCIAL TREASURER OF ALBERTA v. KERR.

of Alberta (July 22, 1932) upon a case stated by agreement of the parties and referred to the Appellate Division pursuant to the Alberta Rules of Court.

The cross-appeals related to the validity of duties assessed under s. 7 of the Succession Duties Act of Alberta—R. S. Alta., 1922, c. 28, as amended in 1923 and 1927 (1)—in respect of the property of Isaac Kendall Kerr, who died on December 3, 1929, and was domiciled and resident in Alberta. The beneficiaries and the executors of his will were resident in the Province. The executors, together with a surety, entered into a joint and several bond pursuant to ss. 12 and 13 of the Act for the payment of any duty to which the property of the deceased coming to the hands of the executors should be found liable.

The facts as appearing in the case stated, the questions submitted to the Court, and the terms of s. 7 of the Act are set out in the judgment of the Judicial Committee.

Sects. 9 and 16 of the Act provided :—

" 9. Every person resident in the Province to whom passes on the death of any person domiciled in the Province any personal property situate outside the Province, shall pay to the Provincial Treasurer for the use of the Province a tax calculated upon the value of the property in accordance with the rates and subject to the considerations set forth in sections 7 and 8 of this Act."

" 16. The duties imposed by this Act shall be payable out of the shares of each person or beneficiary entitled to share in the property of the deceased, according to the rate applicable as aforesaid to such person or beneficiary."

By the British North America Act, 1867, s. 92 (head 2), the Province had legislative power to impose " direct taxation within the province, in order to the raising of a revenue for provincial purposes."

In answer to the first question submitted the Appellate Division held by a majority (Clarke, Lumley, and MacGillivray JJ.A. ; Ford and Mitchell JJ.A. dissenting)

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(1) The Act was further amended and consolidated by c. 16 of the Statutes for 1932.

J. C.
1933

PROVINCIAL TREASURER OF ALBERTA
v.
KERR.

that the duties levied in respect of personal property of the deceased locally situate outside the Province were invalid. In answer to the second question submitted, the learned judges held unanimously that the duties levied in respect of real and personal property locally situate within the Province were direct taxation and consequently valid; in so holding the earlier decision of the Court *In re Cust* (1) was followed.

The Province appealed from the judgment in answer to the first question, and the executors appealed from the judgment in answer to the second question.

1933. May 23, 25, 26, 29, 30. *H. J. Wilson* for the Province. The deceased being domiciled in the Province, the duties were validly imposed in respect of his personal property situate outside the Province. The duties were taxation "within the Province"—First, because the Act, having regard especially to ss. 7, 9 and 16, did not impose the duties on the property, but on its transmission within the Province. The taxation was therefore valid under the decision of the Board in *Alleyn* v. *Barthe.* (2) The amendments of the Act made in 1927, in consequence of decisions of the Judicial Committee, altered in that respect the character of the duties so imposed. Secondly, and alternatively, because the duty was of the nature of a succession or legacy duty, as it was imposed by ss. 9 and 16 upon the beneficiaries and varied with their relationship to the deceased. The taxation being of that nature the principle mobilia sequuntur personam applied: *Winans* v. *Att.-Gen.* (*No.* 2). (3) It is clear from *Thomson* v. *Advocate-General* (4) and other cases that that principle was well established in England before 1867, and it is to be presumed that it was intended to apply under the British North America Act. The Supreme Court of Canada, in *Smith* v. *Provincial Treasurer of Nova Scotia* (5) and *Barthe* v. *Alleyn-Sharples* (6), held that under the maxim personal property

(1) 8 Alb. L. R. 308.
(2) [1922] 1 A. C. 215.
(3) [1910] A. C. 27, 31.
(4) (1845) 12 Cl. & F. 1.
(5) (1918) 58 Can. S. C. R. 570.
(6) (1920) 60 Can. S. C. R. 1.

was to be regarded as within the Province where the deceased was domiciled, although it was physically situate outside the Province, and the judgments of the Board on appeal in these cases do not in terms dissent from that view: see also *Att.-Gen. for Ontario* v. *Baby.* (1) The Board applied the principle in *Lambe* v. *Manuel* (2); in *Cotton* v. *Rex* (3) it was held not to be applicable, but on the ground that the statute in terms taxed only property within the Province. Sect. 7 of the statute now in question clearly shows an intention that the principle should apply; effect should be given to the intention of the legislature in that respect: *Blackwood* v. *The Queen.* (4) The decision in *Woodruff* v. *Att.-Gen. for Ontario* (5) is distinguishable, because the duty in that case was not upon the transmission but upon the property. Thirdly, because the liability under the bond was only in respect of property "coming to the hands" of the executors, and therefore was confined to property within the Province.

The duties were also "direct taxation." The Act did not make the executors personally liable for the duties. Under ss. 9 and 16 the beneficiaries were liable on personal property outside the Province; the lien under s. 24 was confined to property within the Province. The executors could not be sued for the duties and were not obliged to give the bond. The present case is therefore distinguishable from *Cotton* v. *Rex* (6) and *Burland* v. *The King.* (7) Moreover, both those cases related to property outside the Province. In *Rex* v. *Lovitt* (8), where the property was held to be within the taxing Province, the tax was not held to be indirect although the executor was made personally liable. In *City of Halifax* v. *Fairbanks' Estate* (9) the Board said that *Cotton's* case "turned on its own facts." It is submitted that *In re Cust* (10) and the present case, rightly held that *Cotton's* case did not apply in the case of property outside the Province. [Reference was made also to *In re Muir Estate* (1), also to four decisions of the Supreme Court of British Columbia as to succession duty in that Province.]

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(1) (1926) 59 Ont. L. R. 181; 60 Ont. L. R. 1.
(2) [1903] A. C. 68.
(3) [1914] A. C. 176, 186.
(4) (1882) 8 App. Cas. 82, 96.
(5) [1908] A. C. 508.
(6) [1914] A. C. 176.
(7) [1922] 1 A. C. 215.
(8) [1912] A. C. 212.
(9) [1928] A. C. 117, 126.
(10) 8 Alb. L. R. 308.

W. H. McLaws for the executors. At confederation it was necessary to limit the powers of the Provinces to impose taxation so as to prevent a Province encroaching upon the power of another Province. The limitations contained in s. 92, head 2, of the British North America Act prevent decisions with regard to statutes enacted by legislatures with unlimited powers from being applicable. Although the words " within the Province " in head 2 do not confine the power to taxing property in the Province they mean that if taxation is in respect of property the property must be locally situated in the Province. The maxim " mobilia sequuntur personam " has been misapplied in some decisions in Canada; it relates to the law governing the devolution of personal property, and does not affect the situs of the property. In *Lambe* v. *Manuel* (2), where the Board gave effect to the principle, the property was locally situate in the taxing Province, but the deceased was domiciled outside it, and the tax was in respect of transmissions in the Province. The present case is distinguishable from *Alleyn* v. *Barthe* (3), because the effect of s. 7 of the Act is to impose the taxation upon personal property outside the Province, not upon its transmission; ss. 9 and 16 merely give power for collecting the duties from the beneficiaries, but do not alter the character of the tax. The object of the Act was to tax property passing upon the death. There is no conflict between *Alleyn* v. *Barthe* (3) and *Woodruff* v. *Att.-Gen. for Ontario* (4), and upon the construction of the Act the latter decision applies to this case. *Rex* v. *Lovitt* (5), like the present case, is an example of a duty described as a succession duty but being found to be a tax imposed upon the property itself.

The duties were also invalid both as to property within and personal property outside the Province, because they

(1) (1915) 51 Can. S. C. R. 428.
(2) [1903] A. C. 68.
(3) [1922] 1 A. C. 215.
(4) [1908] A. C. 508.
(5) [1912] A. C. 212.

were indirect taxation having regard to the decisions of the Board in *Cotton's* case (1) and *Burland's* case. (2) By ss. 11 to 13 of the Act the executors in order to obtain probate had to pay the duties or give a bond upon which they were personally liable. The fact that under s. 9 the beneficiaries could be required to pay does not affect the matter. There was no provision in the Act, similar to that in the Quebec statute considered in *Alleyn* v. *Barthe* (3), expressly providing that the executors were not to be personally liable. With the exception of Alberta and British Columbia the Provinces have brought their statutes imposing succession duties into line with the Quebec legislation. In applying the principle in *Cotton's* case no valid distinction can be drawn between property within and property outside a Province. *In re Cust* (4) was overruled in effect by *Burland's* case. (2) In *Rex* v. *Lovitt* (5) the question of direct taxation was not dealt with; moreover the duty there in question was in the nature of a probate duty payable for local administration.

H. J. Wilson on the cross-appeal contended that on the true construction of the statute the executor was not made personally liable for the duties, and that the taxation was direct, reference being made to *Att.-Gen. for Quebec* v. *Reed* (6); *Rex* v. *Caledonian Insurance Co.* (7); *Toronto General Trusts Corporation* v. *The King* (8); *Erie Beach Co.* v. *Att.-Gen. for Ontario* (9); *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (10); *City of Halifax* v. *Fairbanks' Estate.* (11) He replied on the original appeal.

July 27. The judgment of their Lordships was delivered by

LORD THANKERTON. The late Isaac Kendall Kerr died on December 3, 1929, domiciled and resident in the Province of Alberta. He left a large estate, and the respondents in the original appeal, both of whom are resident in the city of Calgary, obtained letters probate as executrix and executor

(1) [1914] A. C. 176.
(2) [1922] 1 A. C. 215.
(3) [1922] 1 A. C. 215, 228.
(4) 8 Alb. L. R. 308.
(5) [1912] A. C. 212.
(6) (1884) 10 App. Cas. 141.
(7) [1924] S. C. R. 207.
(8) [1919] A. C. 679.
(9) [1930] A. C. 161.
(10) [1930] A. C. 357, 363.
(11) [1928] A. C. 117.

of his will. Thereafter duties amounting to $54,754.21 were assessed under the Alberta Succession Duties Act by the Provincial Treasurer in respect of the property of the deceased, and the respondents, along with a surety, entered into the bond afterwards referred to in order to secure payment of these duties.

The respondents challenged the validity of the imposition of these duties by the Province and a special case was agreed to by the parties, which was referred, pursuant to the Alberta Rules of Court, to the Appellate Division of the Supreme Court of Alberta. In this case two questions were referred for determination, and the decision of the Appellate Division, given July 22, 1932, has led to the original appeal by the Provincial Treasurer and the Attorney-General for Alberta (hereinafter called "the Province"), and a cross-appeal by the executrix and executor (hereinafter called "the executors").

The property in respect of which the duties were imposed is described in the special case as follows :—

"(2.) The property owned by the said Isaac Kendall Kerr at the time of his death consisted of—(*a*) certain personal property of the aggregate value of $265,703.58 composed of shares and other securities of various companies which had no head office in the Province of Alberta, and none of which had any registration or transfer office within the said Province, together with other personal property locally situate outside of the said Province. The share certificates and other documents evidencing such shares and other securities were found in the City of Calgary, in the Province of Alberta. (*b*) Certain real property and personal property having an aggregate value of $274,697.03. The real property is situate within the Province of Alberta and the personal property consists of shares and other securities in companies with head office and transfer office situate within the Province of Alberta, and other personal property locally situate within the said Province. (3.) Within two years prior to his death the said Isaac Kendall Kerr transferred to Clara E. Kerr, one of the plaintiffs, certain real estate situate within the Province of Alberta, together with certain personal estate."

No question is raised as to the duties in respect of the property in para. 3, and the following questions were submitted for the opinion of the Court: "(1.) Whether or not the succession duties levied in respect of the property mentioned in sub-s. (*a*) in para. 2 of the special case are valid and payable to the defendants or either of them. (2.) Whether or not the succession duties levied in respect of the property mentioned in sub-s. (*b*) in para. 2 of the special case are valid and payable to the defendants or either of them."

The determination of the validity of the imposition of the duties depends on the application of the limits placed upon the taxing powers of a Province by s. 92 of the British North America Act, 1867—namely, "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes," to the provisions of the Alberta Succession Duties Act. As regards the first question, which relates to personal property locally situate outside the Province, the issue is twofold—namely, whether the taxation is direct and whether it is within the Province. On the second question, which covers real and personal property situate within the Province, the issue is whether the taxation is direct.

Dealing first with the question of taxation "within the Province," the general law as to the power of taxation of a sovereign state has been thus stated: *Blackwood* v. *The Queen* (1): "There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each state levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property."

There can be no doubt that the Alberta Succession Duties Act purports to impose taxation on the basis (inter alia) of personal property situate outside the Province, and therefore, if it possessed unlimited sovereign power, it would be entitled to impose such taxation on its subjects. Accordingly, the present question only arises because of the limitations placed on the legislative powers of the Province by s. 92 of the British North America Act, 1867, and, for this reason, the cases on legacy and succession duties in England are of little assistance for the present purpose. Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interests in property or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons—in any event, the duties here in question are not of that nature. In considering the limits placed on Provincial taxation, the Courts have invariably had regard to the basis or subject-matter in respect of which the taxation is imposed, and their Lordships agree with the statement of Anglin C.J. in *Rex* v. *Cotton* (1), where he said : " in order that a Provincial tax should be valid under the British North America Act, in my opinion the subject of taxation must be within the province."

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(1) 8 App. Cas. 82, 96.

The Province maintained in the first place, that under the Alberta Succession Duties Act the subject-matter of taxation was the transmission of the property and not the property itself, and fell within the principle of the decision of this Board in *Alleyn* v. *Barthe*. (2)

In their Lordships' opinion, the principle to be derived from the decisions of this Board is that the Province, on the death of a person domiciled within the Province, is not entitled to impose taxation in respect of personal property locally situate outside the Province, but that it is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the Provincial law of personal property locally situate outside the Province.

In *Lambe* v. *Manuel* (3) a claim was made by the Province of Quebec for succession duties on movable property locally

(1) (1912) 45 Can. S. C. R. 469, 536.

(2) [1922] 1 A. C. 215.

(3) [1903] A. C. 68.

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situate in that Province, which formed part of the succession of a testator domiciled in Ontario. The claim was rejected on the view that, on its true construction, the Quebec Succession Duty Act only applied, in the case of movables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec. Sect. 1191B of the Quebec Act of 1892, on which the issue turned, provided as follows : " All transmissions, owing to death, of the property in, usufruct, or enjoyment of, moveable and immoveable property in the province shall be liable to the following taxes. . . . ." Thus the taxes were held to be imposed in respect of transmissions.

The Quebec Act of 1892 and the later Act of 1906, which re-enacted the words above quoted with alterations immaterial to this point, were considered in the case of *Cotton* v. *Rex* (1), and were construed as imposing the duties in respect of the transmission of the property. It was held, on construction, that neither of these Acts imposed any duty upon the transmission of movable property outside the Province, and also that the taxation was not direct, in respect that it was imposed on " someone who was not intended himself to bear the burden but to be recouped by someone else."

In *Woodruff* v. *Att.-Gen. for Ontario* (2), the deceased having died domiciled in the Province of Ontario, that Province claimed succession duty in respect of movable property locally situate in the United States. It was held to be an attempt to levy a tax on property locally situate outside the Province, which was beyond their competence. The Ontario Act of 1897, s. 4, sub-s. 1, provided " the following property shall be subject to a succession duty," which clearly was not a tax in respect of the transmission of a succession.

The case of *Rex* v. *Lovitt* (3) provides an interesting contrast to *Lambe's* case (4). The testator, who died domiciled in Nova Scotia, was possessed of certain personal property locally situate in the Province of New Brunswick, in respect of which the latter Province claimed succession duty. It

(1) [1914] A. C. 176.
(2) [1908] A. C. 508.
(3) [1912] A. C. 212.
(4) [1903] A. C. 68.

was held that, although called a succession duty, the tax in question was laid on the corpus of the property, and its payment was made a term of the grant of ancillary probate, and the claim to duty was upheld. The New Brunswick Succession Duty Act, 1896, s. 5, sub-s. 1, enacted: "All property, whether situate in this province or elsewhere, ... passing either by will or intestacy . . . . shall be subject to a succession duty."

In *Alleyn* v. *Barthe* (1), though an argument to the contrary was submitted, the judgment clearly proceeds on the footing that the taxation was imposed in respect of the transmission, and it may be noted that by the Quebec Succession Duty Act, 1909, as revised in 1914, s. 1387B: "All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death," were made liable to the duties; this provision is substantially the same as that under construction in *Lambe's* case (2). The main question in *Alleyn's* case (1) was whether the taxation was direct, but, in delivering the judgment of this Board, Lord Phillimore, after referring to the statutory provisions, states: "The conditions therein stated upon which taxation attaches to property outside the Province are two: (1.) that the transmission must be within the Province; and (2.) that it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is, as the universal legatee in this case was, either domiciled or ordinarily resident within the Province; for, in the connection in which the words are found no other meaning can be attached to the words 'within the Province' which modify and limit the word 'transmission.' So regarded, the taxation is clearly within the powers of the Province."

The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary. In the present case, s. 7, sub-s. 1, is the charging provision, and as amended provided as follows:—

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(1) [1922] 1 A. C. 215.

(2) [1903] A. C. 68.

"7.—(1.) Save as otherwise provided, all property of the owner thereof situate within the Province, and in the case of an owner domiciled in the Province, all the personal property of the owner situate outside the Province, and passing on his death, shall be subject to succession duties at the rate or rates set forth in the following table, the percentage payable on the share of any beneficiary being fixed by the following, or by some one or more of the following considerations, as the case may be:—

(*a*) the net value of the property of the deceased;
(*b*) the place of residence of beneficiary;
(*c*) the degree of kinship or absence of kinship of the beneficiary to the deceased:"

In their Lordships' opinion, the terms of this section, which is very similar to that considered in *Lovitt's* case, clearly show that the subject-matter of the taxation is the property and not the transmission of property; it is in marked contrast to the terms of the Quebec section considered in the cases of *Lambe* and *Alleyn*. It may be added that s. 9 of the Alberta Act, on which the Province sought to rely, does not modify this view, but merely provides a particular liability for payment of the tax.

The Province next contended that, although locally situate outside the Province, the personal property of a person, who dies domiciled within the Province, is to be treated as "within the Province" for the purposes of s. 92 of the British North America Act, by reason of the application of the rule embodied in the maxim "mobilia sequuntur personam." This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A dies domiciled in the United States of America, leaving movable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A, will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of mobilia sequuntur personam in exercising its jurisdiction over the movable property in England, the locus of the latter remaining unchanged; in no sense could the property be described as "within America."

The Province further maintained that, as the bond given by the executors limited their liability to the duties in respect of property "coming into their hands," and the property here in question had admittedly come into their hands, the taxation was in respect of property within the Province; but, in their Lordships' opinion, the bond merely defines the extent of the security taken from the executors, and its terms cannot affect the validity or invalidity of the duties imposed under s. 7 of the Act. While that is sufficient to dispose of the contention, it may well be doubted whether "coming into their hands" means anything more than that the executors have completed their title to the property in question, the local situation of the property remaining unchanged.

Accordingly, their Lordships are of opinion that the duties under s. 7, so far as imposed on personal property locally situate outside the Province, did not come within the limits placed on Provincial taxation by s. 92 of the British North America Act.

There remains the question of "direct taxation." The principle to be applied in such cases is now well settled. Is the duty imposed on the very person whom the legislature intended or desired should pay it, without any expectation or intention that he should indemnify himself at the expense of some other person? Under the Alberta Succession Duties Act the duties in question were imposed on the executors on their application for probate, and letters probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships' opinion the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* (1) and *Alleyn* (2), already referred to—namely, whether the executor is personally liable for the duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is not personally liable for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

In *Cotton's* case, the provisions of the Quebec Succession Act, 1906, were construed by this Board as entitling the collector of inland revenue to collect the whole of the duties on the estate from the person making the declaration and as providing, in the ordinary case, for payment of the duties by some one who was not intended himself to bear the burden but to be recouped by some one else, and the taxation was held to be indirect. Three erroneous views as to this decision have been subsequently propounded, two of which were corrected in *Burland* v. *The King* (2), which was decided by this Board at the same time as *Alleyn's* case. The first suggestion was that the illustration of the declaration by the notary, before whom the will was executed, was based on inaccurate information, and that the value of the decision was thereby impaired; but it was pointed out in *Burland's* case that the case of the executor, or administrator, or legatee by a particular title might equally well have been taken, and that the error did not affect the force of the decision. The second suggestion in *Burland's* case was that the point was not necessary for the decision in *Cotton's* case, which had already been determined by other independent considerations; but it was held that the decision in *Cotton's* case on the invalidity of the statute was just as complete and fundamental as the decision in the earlier part of the judgment

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(1) [1914] A. C. 176. (2) [1922] 1 A. C. 215.

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on the construction of the statute. The third suggestion, which has been adopted in certain decisions in Canada, including the present case, is that the decision on direct taxation in *Cotton's* case was confined to taxation in respect of movable property not within the Province.

In their Lordships' opinion, that view is not justified either in fact or in principle. Two passages from the judgment may be cited (1): (1.) " This question is the following: whether a succession duty of the kind contended for by the respondent could be imposed by the provincial legislature without exceeding its powers. In considering this point we may assume that the operative clause specifically extends to the taxation of all the property of the testator as defined in the statute, or, to express it more simply, that the limiting words, 'in the province,' have been deleted from that clause," and (2.) " For the purpose of deciding this question it will be necessary to examine closely the legislation imposing it. The provisions of the Act leave much to be desired in respect of clearness. The definition of 'property' contained therein is admittedly too wide if it is intended to form a basis for provincial taxation, since it would include the movable property of any person who might be resident in the province at the time of his death, whether domiciled therein or not. But, putting aside such considerations, the appellants not only admit, but contend, that the Act imposes a succession duty upon all movable property, wherever situated, of a testator domiciled in the province."

In principle also the local situation of the property comprised in the estate of the deceased appears to be irrelevant to the issue whether the executor is personally liable for payment of the duties, in the absence of any distinction in this respect drawn by the Act itself as regards duties in respect of different classes of property. In the Quebec Act, which was a tax on transmission, no such distinction was drawn, nor is any such distinction to be found in the present case.

In *Burland* v. *The King* (2) the testator had died in 1907, and the Quebec Act was again in question. It was held that

(1) [1914] A. C. 176, 189, 193.

(2) [1922] 1 A. C. 215.

certain amendments to the Act, which had followed immediately after the decision in *Cotton's* case, were insufficient to avoid the applicability of that decision, and the taxation was held to be indirect. But in *Alleyn's* case, which was decided at the same time as *Burland's* case, the testator died in 1913, by which time further important amendments had been enacted, which led to a contrary conclusion. In their Lordships' opinion, it is clear that the reason for this conclusion was the new provision in art. 1387g of the Quebec Act, which was in the following terms: "No notary, executor, trustee or administrator shall be personally liable for the duties imposed by this section. Nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and if he fails to do so may be sued for the amount thereof, but only in his representative capacity, and any judgment rendered against him in such capacity shall be executed against such property or money only."

The Alberta Succession Duties Act contains no similar clause excluding personal liability of an executor, etc., and, in their Lordships' opinion, it is clear, under ss. 11 and 12 of the Act, that an executor who applies for probate becomes personally liable for the amount of the duties determined by the Provincial Treasurer, and must either pay them or give security for their payment by a bond in the statutory form, and, further, that under the terms of the bond the executor is personally liable for payment of the duties in respect of any of the property coming into his hands. It follows that the taxation is indirect and beyond the competency of the Province.

Reliance was placed in the Court below on the case *In re Cust* (1), but it will be clear from the views their Lordships have expressed as to the principle laid down by the cases of *Cotton* and *Alleyn*, that the decision of the Court which decided *Cust's* case on appeal was erroneous, and must be taken as overruled. *Rex* v. *Lovitt* (2), referred to in that

(1) 8 Alb. L. R. 308.

(2) [1912] A. C. 212.

decision, was the case of a local probate duty charged by the Province, where the property was locally situate, for the collection or local administration of the particular property, and was not a case of pure taxation, as in *Cotton's* case (1) and the present one. The question of direct or indirect taxation is not referred to in the judgment, and the only reference to it in the argument was in a contention that the tax was imposed on a transmission in another Province and was therefore not direct; but it was held that the tax was not on transmission but on the corpus of the property.

Their Lordships are therefore of opinion that the succession duties levied in respect of the property mentioned in both sub-ss. (*a*) and (*b*) in para. 2 of the special case are not valid. In the case of sub-s. (*a*) the taxation is neither direct nor within the Province, and in the case of sub-s. (*b*) the taxation is not direct.

Their Lordships will accordingly humbly advise His Majesty that the appeal for the Province should be dismissed, and that the cross-appeal for the executors should be allowed, and that the judgment of the Appellate Division of the Supreme Court of Alberta should be varied by substituting for the words "are valid and payable" at the end of the second declaration the words "are invalid and are not payable," and should otherwise be affirmed. By agreement of parties there will be no order for costs.

Solicitors for Province: *Blake & Redden.*
Solicitors for executors: *Lawrence Jones & Co.*

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(1) [1914] A. C. 176.

[PRIVY COUNCIL.]

MERRILL RING WILSON, LIMITED, AND OTHERS . . . . APPELLANTS;

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July 28.

AND

WORKMEN'S COMPENSATION BOARD . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada (British Columbia)—Workmen's Compensation—Medical Aid—Principle of Assessments—Hazard of Industries—Workmen's Compensation Act (R. S. B. C., 1924, c. 278), s. 32; s. 33, sub-s. 2.

Upon the true construction of the Workmen's Compensation Act, of British Columbia, assessments made under the Act for the purpose of raising funds for medical aid are not required to be made so that all employers liable to be so assessed shall be assessed at the same rate upon their pay-rolls irrespective of the hazards of their respective industries; the words "by assessment upon the employers generally" in s. 33, sub-s. 2, of the Act do not cut down the power given to the respondent Board by s. 32 to rate the assessments upon the pay-rolls or in such manner as the Board may deem proper.

Judgment of the Court of Appeal for British Columbia affirmed.

APPEAL (No. 40 of 1933) from a judgment of the Court of Appeal for British Columbia (January 10, 1933) affirming a judgment of Murphy J. (April 18, 1932).

The appeal related to the Workmen's Compensation Act of British Columbia (R. S. B. C., 1924, c. 278). The question for determination was whether, as the plaintiff-appellants contended, assessments made by the respondent Board for the purpose of raising funds for medical aid had to be made so that all employers liable to be so assessed were assessed at the same rate upon their pay-rolls, or whether, as the respondent Board contended, the Board in assessing might have regard to the hazards of the respective industries.

Murphy J. held that upon the true construction of the Act the Board could adopt the latter method. That decision was unanimously affirmed by the Court of Appeal

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* *Present:* LORD BLANESBURGH, LORD MERRIVALE, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

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MERRILL RING WILSON, LD. v. WORKMEN'S COMPENSATION BOARD.

(J. A. Macdonald C.J., and Martin, Galliher, McPhillips, and M. A. Macdonald JJ.A.).

The material provisions of the Act are set out in the judgment of the Judicial Committee.

1933. July 7, 10. *E. C. Mayers K.C.* for the appellants.
C. W. Craig K.C. and *Maitland K.C.* for the respondents.

July 28. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. This case comes before their Lordships on appeal from a judgment of the Court of Appeal for British Columbia affirming a judgment of the Supreme Court of that Province, which dismissed an action brought by the appellants against the Workmen's Compensation Board. That Board (hereinafter referred to as "the Board") is a body constituted for the administration of Part I. of the Workmen's Compensation Act (R. S. B. C., 1924, c. 278).

The scheme of Part I. of the Act is to create and maintain a fund called the "accident fund" mainly by assessments on the employers in the industries within the scope of that Part. The power and duty of assessing the employers are placed in the hands of the Board, as appears from the provisions of the Act herein recited.

The Act provides (s. 28) for the division of all industries within the scope of Part I. into eighteen specified classes, of which class 1 includes "logging"; but the Board had power (s. 35) to establish "such sub-classifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be deemed just." Acting under this power, the Board has constituted "logging west of the Cascades" as sub-class 2 of class 1.

The present proceedings are a consolidation of two actions commenced against the Board by various companies (employers of labour) suing on behalf of themselves and all other members of sub-class 2 of class 1. In other words the plaintiffs represent the industry classified separately as "logging west of the Cascades."

The relief claimed covered an extensive area: but the sole point which has survived for the consideration of their Lordships' Board may be stated thus: Whether (as the appellants contend) assessments made under the Act for the purpose of raising funds for medical aid must be so made that all employers liable to be so assessed shall be assessed at the same rate upon their pay-rolls irrespective of the hazards of their respective industries, or whether (as the respondents contend) the Board may make those assessments in such a way that regard shall be had to the respective hazards of the various industries of the employers liable to be assessed for the particular purpose.

There is, it would appear, no dispute that as regards assessments for the purpose of raising funds for the purposes of the Act other than medical aid the respective hazards of the various classes of industries must be a determining factor in the making of the assessments, but the appellants contend that upon the true construction of the Act and in particular of s. 33 thereof, the Board is bound in making assessments in respect of medical aid to disregard this factor.

The question in dispute is therefore one which is solely concerned with assessments in respect of medical aid and which depends upon the true construction of the Act.

In the course of the argument before their Lordships, for the purpose of illustrating the hardships which it was said would ensue if the contention of the respondents prevailed, it was alleged that the Board had adopted a particular method of assessment which embodied not only the feature complained of in the action, but other features alleged to be in contravention of the Act. Their Lordships had no means of ascertaining whether these allegations were well founded or not. They were apparently not raised or suggested in the Courts of British Columbia; they certainly are not referred to in the judgments below. Their Lordships think that they must be disregarded, and that the point for decision must be confined within the limits indicated above.

The relevant provisions of the Act may now be cited: Sect. 2 (1.) "In this Act, unless the context otherwise requires :—'Accident Fund' shall mean the fund provided for the payment of compensation, outlays, and expenses under Part I.: . . . . 'Compensation' shall include medical aid . . . . 'Medical aid' when used in Part I. shall include the several matters and things which the Board under the provisions of s. 23 is empowered to provide for injured workmen."

After various sections which provide for payment of compensation for personal injury and where death results from the injury the Act makes the following provisions for medical aid :—

"23.—(1.) In addition to the other compensation provided by this Part, the Board shall have authority to furnish or provide for the injured workman such medical, surgical, and hospital treatment, transportation, nursing, medicines, crutches, and apparatus, including artificial members as it may deem reasonably necessary at the time of the injury, and thereafter during the disability to cure and relieve from the effect of the injury, and the Board shall have full power to adopt rules and regulations with respect to furnishing medical aid to injured workmen entitled thereto and for the payment thereof.

"(4.) Any plan for providing medical aid in force between an employer and his workmen or otherwise available to the workmen, and which in the opinion of the Board, after investigation of the facts, is found on the whole to be not less efficient in the interests both of the employer and of the general body of workmen than the provisions for medical aid contained in this section, may by order of the Board, subject to such conditions as the Board may require, be declared to be a plan approved by the Board. So long as the order of the Board approving the plan is in force and unrevoked the provisions of Subsections (1.), (2.), and (3.) of this section and of Subsection (1.) of Section 33 shall not apply to any of the workmen in any employment embraced in such plan."

Sect. 28 runs thus : "28. For the purpose of assessment in order to create and maintain a fund, to be called the

'Accident Fund,' for the payment of the compensation, outlays, and expenses under this Part, all industries within the scope of this Part shall, subject to ss. 29 and 30, be divided into the following classes:—Class 1.—Lumbering; logging; sawmills; planing mills; manufacture of pulp and paper."

The other relevant provisions of the Act are as follows: "32.—(1.) For the purpose of creating and maintaining an adequate Accident Fund, the Board shall every year assess and levy upon and collect from the employers in each class by an assessment or by assessments made from time to time rated upon the pay-roll, or in such other manner as the Board may deem proper, sufficient funds, according to an estimate to be made by the Board:—

(*a*) To provide in connection with s. 33 a special fund to meet the cost of medical aid:

(*b*) To meet all other amounts payable from the Accident Fund under this Part during the year:

(*c*) To provide a reserve by way of a contingent fund in aid of industries or classes which may become depleted or extinguished:

(*d*) To provide in each year capitalised reserves sufficient to meet the periodical payments of compensation accruing in future years in respect of all accidents which occur during the year; and

(*e*) To provide a reserve fund to be used to meet the loss arising from any disaster or other circumstance which, in the opinion of the Board, would unfairly burden the employers in any class.

(2.) Assessments may be made in such manner and form and by such procedure as the Board may deem adequate and expedient, and may be general as applicable to any class or sub-class, or special as applicable to any industry or part or department of an industry.

(3.) Assessments may, wherever it is deemed expedient, be collected in half-yearly, quarterly, or monthly instalments, or otherwise; and where it appears that the funds in any class are sufficient for the time being, any instalment may be abated or its collection deferred.

(4.) In case the estimated assessments in any class prove insufficient, the Board may make such further assessments and levies as may be necessary, or the Board may temporarily advance the amount of any deficiency out of any reserve provided for that purpose, and add such amount to any subsequent assessments.

(5.) The Board shall give notice to each employer of the amount of each assessment due from time to time in respect of his industry and the time when the same is payable. The notice may be sent by post to the employer, and shall be deemed to be given to him on the day on which the notice is posted. 1916, c. 77, s. 29.

33.—(1.) Every employer who is required to contribute to the Accident Fund by way of assessment under this Part is hereby authorized and required to retain from the moneys earned by each workman in his employment the sum of one cent for each day or part of day the workman is employed as a contribution toward the cost of medical aid, and to pay the sum so retained to the Board from time to time at the time each assessment is due and payable by the employer, and at such other times as the Board may direct.

(2.) The moneys received by the Board under subsection (1.) shall form part of the Accident Fund, and shall constitute a special fund to be used only in defraying the cost of medical aid. Such additional amounts as are required from time to time to meet the cost of medical aid shall be provided by the Board by assessment upon employers generally in all industries within the scope of this Part, except in respect of employments embraced in any plan for providing medical aid approved by the Board under subsection (4.) of section 23. For the purpose of levying and collecting assessments under this subsection, the Board may charge the additional amounts required to meet the cost of medical aid against the funds to the credit of the several classes in such a manner as, on the annual adjustment of assessments under this Part, will result in a general assessment of such additional amounts upon those employers only who are liable to assessment under this subsection."

[(3.) excluded from the section workmen employed on board vessels on which duty had been paid under Part V. of the Canada Shipping Act.]

"35. The Board shall establish such sub-classifications, differentials, and proportions in the rates as between the different kinds of employment in the same class as may be deemed just; and where in the opinion of the Board any particular industry is shown to be so circumstanced or conducted that the hazard differs from the average of the class or sub-class to which the industry is assigned, the Board shall confer or impose upon such industry a special rate, differential, or assessment to correspond with the relative hazard of that industry; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of the individual plant or undertaking of each employer. 1916, c. 77, s. 32.

42. Separate accounts shall be kept of the amounts collected and expended in respect of each class and of each fund set aside by way of reserve or as a special fund for any purpose, but for the purpose of paying compensation the Accident Fund shall, nevertheless, be deemed one and indivisible. 1916, c. 77, s. 37.

43.—(1.) On or before the first day of March in each year the amount of the assessment for the preceding calendar year shall be adjusted upon the actual requirements of the class and upon the correctly ascertained pay-roll of each industry, and the employer shall forthwith make up and pay to the Board any deficiency, or the Board shall refund to the employer any surplus, or credit the same upon the succeeding assessment as the case may require.

(2.) Where in any industry a change of ownership or employership has occurred, the Board may levy any part of such deficiency on either or any of the successive owners or employers, or pay or credit to any one or more of the owners such surplus as the case may require, but as between or amongst the successive owners the assessments in respect

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of such employment shall, in the absence of an agreement between the respective owners or employers determining the same, be apportionable, as nearly as may be, in accordance with the proportions of the pay-rolls of the respective periods of ownership or employership. 1916, c. 77, s. 38."

The point in dispute can now be focused. It depends upon the true construction and inter-relation of ss. 32 and 33. The appellants contend that the power to assess employers for medical aid depends on and is controlled by s. 33, sub-s. 2, and that the only power to assess for medical aid is by assessment upon employers generally in all industries within the scope of Part I., excepting employers with approved plans. These words, they say, exclude the idea of discriminating against employers by reason of the hazards of their industries, and compel the Board to assess the additional amounts upon the employers liable, in proportion to their respective pay-rolls.

The respondents contend that the governing section is s. 32; that s. 32, sub-s. 1 (*a*), is the provision which confers the power to assess employers for medical aid; and that the function of s. 33, sub-s. 2, is not to confer a power of assessment, but to ensure that in exercising the power of assessment already conferred by s. 32, sub-s. 1 (*a*), the Board shall not assess any employer who has a plan approved under s. 23, sub-s. 4.

Murphy J., who tried the action, was of opinion that s. 32 was the empowering section, and that the words in s. 33, "by assessment upon the employers generally," did not cut down the power given to the Board by s. 32 to rate the assessments upon the pay-rolls or in such other manner as the Board may deem proper.

In the Court of Appeal the judges were unanimous. Macdonald C.J., while advancing some additional reasons based upon s. 43, agreed also with the reasons of the trial judge. McPhillips J.A. agreed with the judgment of the trial judge. Macdonald J.A. considered s. 32 to be the controlling section and was of opinion that an assessment was an assessment levied on employers generally even though varied in amount according to the classes affected. All must contribute but not necessarily the same amount.

Notwithstanding the full and careful argument of Mr. Mayers on behalf of the appellants, their Lordships find themselves in agreement with the trial judge and the Court of Appeal.

Medical aid is part of the compensation to be provided under the Act by means of an accident fund, which though split up into various separate accounts is to be deemed one and indivisible (s. 42). This accident fund is created and maintained by assessing, levying and collecting every year upon and from the employers in each class sufficient funds for five specified purposes, one of which is "a special fund to meet the cost of medical aid." This assessment, levy and collection may be effected "by an assessment or by assessments made from time to time rated upon the pay-roll, or in such other manner as the Board may deem proper" (s. 32). The special fund for medical aid is composed of contributions by workmen and of contributions by employers. The contributions by workmen are fixed by s. 33, sub-s. 1, and are to be deducted from wages by the employer and by him paid to the Board. The contributions of the workmen constitute in the first instance the special fund for medical aid. (See the first sentence of sub-s. 2 of s. 33.) So far the meaning of s. 33 seems clear. The remainder of sub-s. 2 deals only with the contributions of the employers to medical aid, and its purport and effect is in the opinion of their Lordships as follows: In the first place it limits the contributions of the employers to such amount as may be required in addition to the contributions of the workman; and in the second place, just as the workmen of an employer who has an approved plan are exempted from contributions to medical aid by s. 23, sub-s. 4, so this sub-section exempts all employers with approved plans from liability to contribute to medical aid either by assessment or by charge against moneys which might otherwise be refunded or credited to them by the operation of s. 43.

Their Lordships do not think that the words "assessment upon employers generally" and "a general assessment" necessarily involve that all assessable employers must bear an equal burden (i.e., must be rated at an equal rate on their pay-rolls), or that the contrast implied is other than the contrast between "general" and "special" which is to be found in s. 32, sub-s. 2. In any event the phraseology of s. 33, sub-s. 2, is quite unequal to the task of cutting down the power given to the Board by s. 32, sub-s. 1 (*a*). The assessment referred to in s. 33, sub-s. 2, is but one of the assessments referred to in s. 32, sub-s. 1; and any assessment under s. 33, sub-s. 2, is merely an assessment made in exercise of the power conferred upon the Board by s. 32, sub-s. 1 (*a*). In exercising that power the Board may make an assessment either rated upon the pay-roll or rated in such other manner as the Board may deem proper.

Their Lordships are therefore of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants will pay the costs of this appeal.

Solicitors for appellants: *White & Leonard.*
Solicitors for respondents: *Blake & Redden.*

END OF VOL. AND OF APPELLATE SERIES FOR 1933.

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